

## REPORTS



OF

## CASES ARGUED AND DETERMINED

IN

# THE SUPREME COURT

2871 F

**OF**

THE STATE OF MISSOURI.

HORATIO M. JONES,  
REPORTER.

VOL. XXIX.

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JUDGES OF THE SUPREME COURT OF THE STATE OF  
MISSOURI.

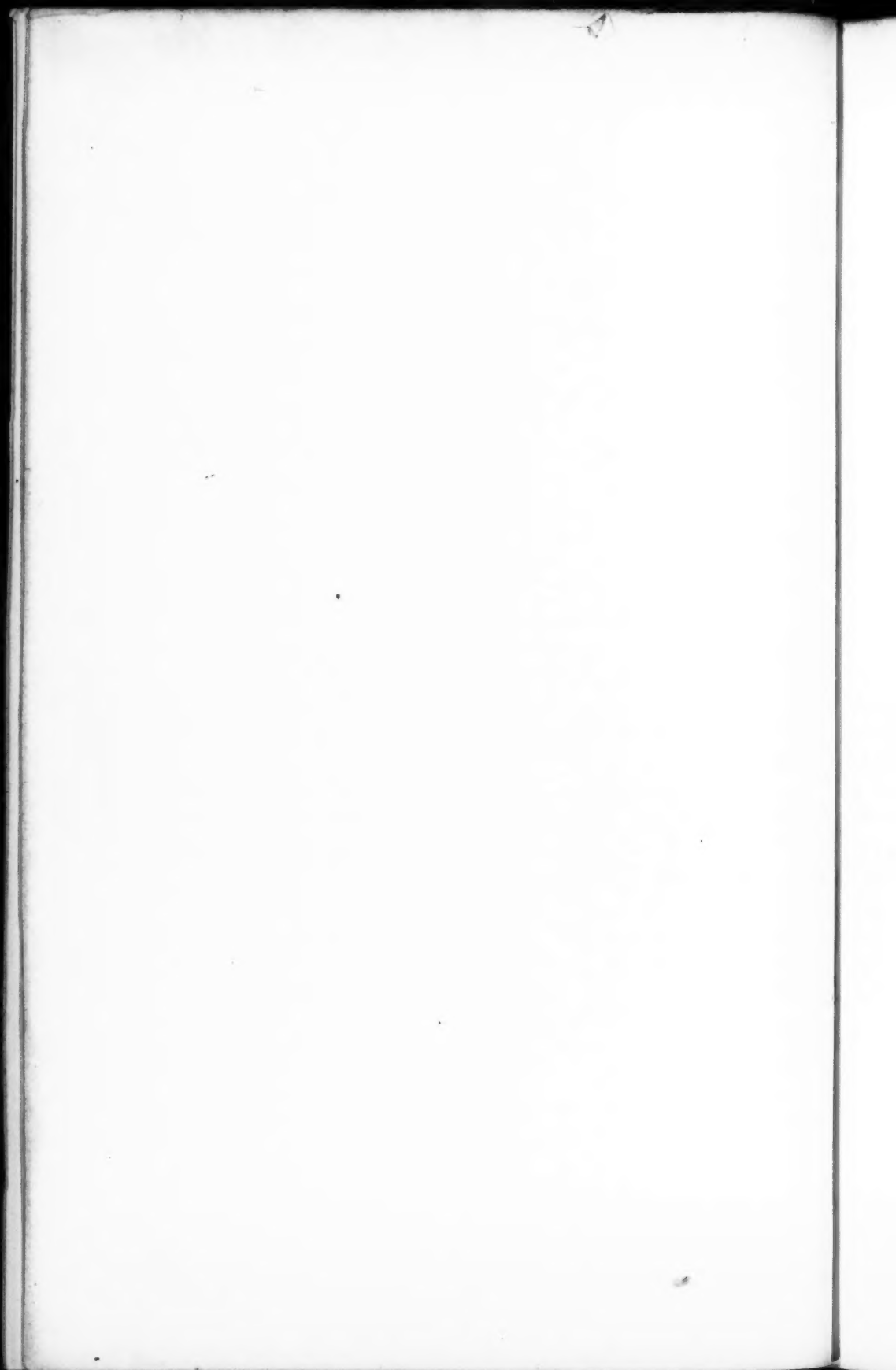
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HON. WILLIAM SCOTT,

HON. WILLIAM B. NAPTON,

HON. EPHRAIM B. EWING.

At an election held in August, 1859, EPHRAIM B. EWING was elected to succeed as judge of the Supreme Court JOHN C. RICHARDSON, whose term of office had expired by resignation. Judge EWING took his seat upon the bench at the October term, 1859.



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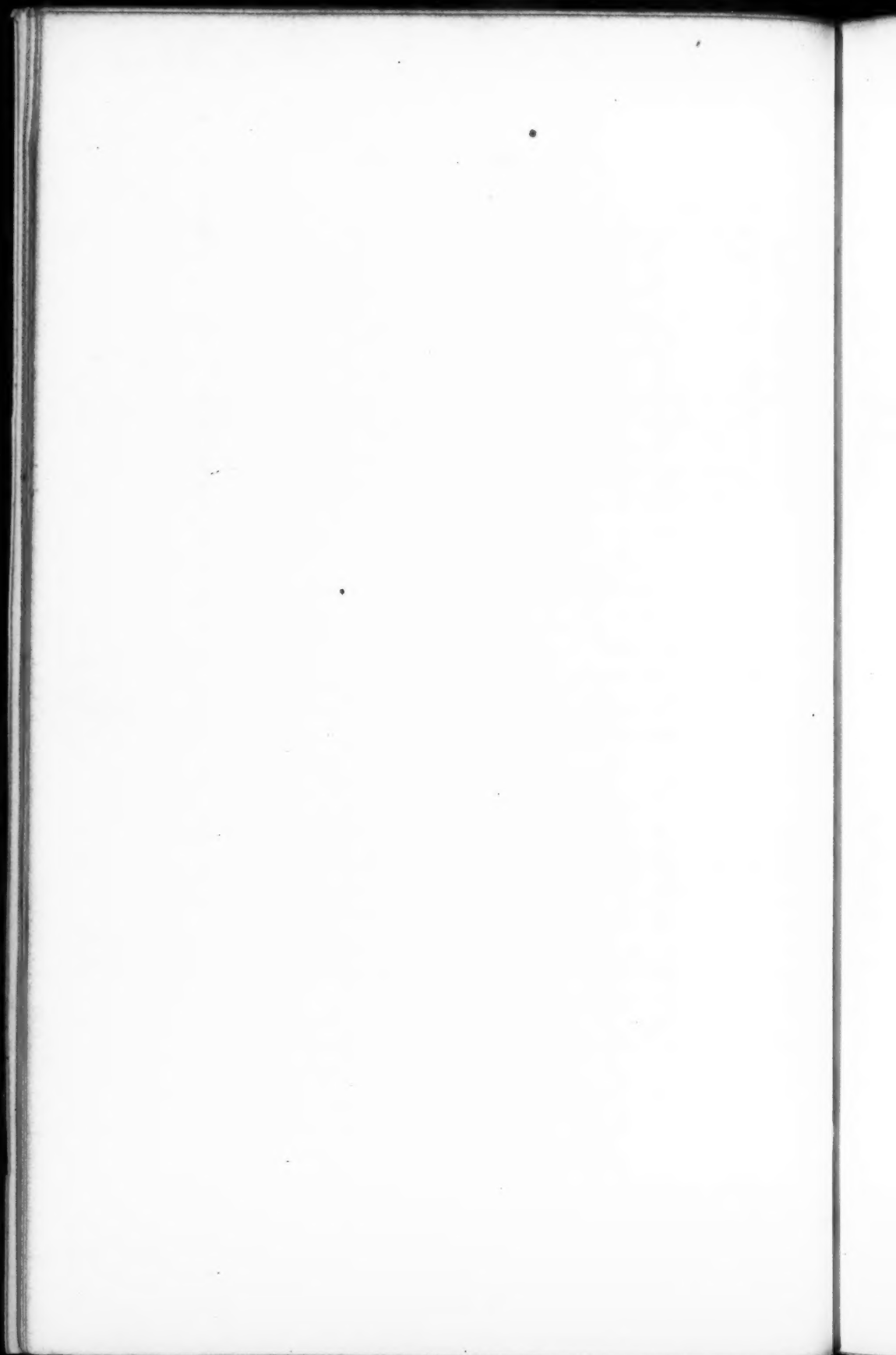
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CASES

ARGUED AND DETERMINED

*Green v. Seligman*  
IN  
THE SUPREME COURT

OF

THE STATE OF MISSOURI,

OCTOBER TERM, 1859, AT ST. LOUIS.

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DRAPER *et al.*, Respondents, v. DRAPER *et al.*, Appellants.

1. To authorize the allowance, under the sixty-fifth section of the partition act (R. C. 1855, p. 1122), of a reasonable attorney's fee in favor of the attorney bringing a suit for partition, and the taxation and collection of the same as other costs, it must appear of record that the plaintiffs in partition had agreed to pay the attorney a certain fee—in which case the judge, if he deemed the sum agreed upon reasonable, might allow the same—or an agreement must be entered of record that the judge should fix the amount of the fee.
2. Such a decree of allowance not warranted by the facts appearing of record may be reversed on an appeal taken to the supreme court at a term subsequent to that at which the allowance is made.

*Appeal from Hannibal Court of Common Pleas.*

This was a suit for partition of real estate. The court decreed a partition in kind. Such partition was accordingly made by the final decree confirming the report of the commissioners. The court also decreed that all costs in the case be taxed against the plaintiffs and defendants according to

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Draper v. Draper.

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their respective interests in the real estate divided. The court, at the same time and in the same decree, allowed to the attorneys who brought the suit the sum of \$1,800 as attorneys' fees, which amount was ordered to be taxed as other costs in the case. The whole real estate divided was valued by the commissioners at \$73,425. At the next term of the court, the defendants moved the court to set aside the allowance of the attorneys' fee, on the grounds that the court had no jurisdiction of the parties or the matter; that there was no sale of the property, and the costs were not first paid by the plaintiffs in the suit; that no notice was given to the defendants. This motion was overruled; whereupon the defendants appealed.

*Wm. E. Cooke, Pratt & McCabe*, for appellants.

I. The court had no jurisdiction of the subject matter or the parties. (Sess. Acts, 1851, p. 208.) There was no sale of the property, and the costs not having been first paid by the plaintiffs, there was nothing to authorize a proceeding against the defendants, and nothing to sustain a judgment against them. There was no notice given to defendants, and they had no day in court.

*Glover & Harrison*, for respondents.

I. The court properly overruled the motion of the defendants. The decree was rendered at the December term, 1858. All the parties were present consenting thereto. No complaint was made of any portion of the decree during that term. It was too late to come into court at the June term, 1859, and complain for the first time of errors committed six months before. (14 Mo. 71; 25 Mo. 351.) The decree was right, and warranted by the statute. (R. C. 1855, p. 1122, § 66.)

Scott, Judge, delivered the opinion of the court.

This case involves the construction of the sixty-fifth section of the act concerning partition, which enacts that the

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Draper v. Draper.

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judge of the court, before whom any case of partition is had, shall allow a reasonable attorney's fee in favor of the attorney or attorneys bringing the suit, which shall be collected and taxed as other costs.

The writ of partition is a necessary one, and it has always had a place in our system of jurisprudence among joint owners of some kind. But there is ground for the apprehension that it has been made the means of depriving thousands of orphans of their patrimony. The common law knew no such thing as a sale in effecting a partition. Under it real estate could not be converted into money, whatever difficulties or disadvantages attended a division of it. It was not until a power of sale was given that the process of partition became of common occurrence—that power by which the crafty, the heartless and the avaricious are enabled to convert the orphan's inheritance into money, with the real but concealed purpose of becoming the purchaser of it, and that, too, in many instances, on their own terms. Indeed the main purpose of a partition in many cases is to enable a minor to convert his real estate into money, a measure promoted by those who see the great gain that will result to them in its being done. Restore the common law, which only allowed a partition in kind and absolutely denied a sale in order to make a division of real estate among joint owners, and it may well admit of a doubt if that process would be resorted to in half as many cases as it is at this time. We do not pretend that there are any circumstances in the case before us that would warrant the foregoing remarks, but they are made with a view to show that there is no reason why the courts should indulge any liberality in construing the provisions which the law concerning partition contains for its execution.

We can not possibly see why a plaintiff to a suit in partition can not as well contract with his attorney, as to the amount of his fee, as in any other case. A reason can not be divined why the judge, in such cases, should fix the attorney's fee, rather than in any others. If a minor is plaintiff

or defendant, he is represented by his next friend or guardian, who is competent to contract for him. There is, then, no necessity for the judge's fixing the amount of the fee, as it is not to be supposed that the attorney is incapable of taking care of himself. Why should the law arbitrarily deprive a suitor of the right to make his bargain for a fee and leave it to a power that may injure and oppress him? Why would the attorney rather prefer that the court should fix the amount of his fee, than that he should be left to contract for it? That reason, whatever it may be, is a conclusive one why the suitor should not be deprived of the right to make his own bargain. This very case shows the danger of allowing the judge to fix the fee. As it stands before us, the sum of eighteen hundred dollars has been allowed to two attorneys for a fee; and in another suit, now here on appeal for dividing a portion of the same estate, a fee of seven hundred and fifty dollars was allowed to the same attorneys, thus making an amount of two thousand five hundred and fifty dollars for dividing one estate. We say nothing about the fees. The record does not show what services more than ordinary were rendered. It is enough for us that the cases are here for reversal on account of the fees which the judge allowed.

In our opinion, the statute was only designed to allow an attorney's fee to be taxed as costs, the judge seeing that it was reasonable, that it was not too great; leaving the attorney and client to contract for its amount, subject to the power of the judge to reduce it if he should be of the opinion that it was more than was reasonable. The law allowing the fee to be taxed as costs, there is a propriety in this, as the guardian may not always be faithful to the interests of his ward, and as a party with a very inconsiderable share, knowing that his portion of the fee would be small, might be willing, at the expense of others, to allow an exorbitant fee to an attorney; for it is to be borne in mind that all parties to the suit, both plaintiffs and defendants, are liable for the fee in proportion to their respective shares in the estate sought to



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be divided. That the judge is to allow the fee, is not at all inconsistent with the idea that it is first to be agreed upon by the parties, as the only object in allowing it is that it may be taxed with the other costs.

This being our view of the statute, we are of opinion that the authority of the judge for ascertaining the amount of the fee allowed should appear upon the face of the record. As the statute never designed that he, in the first instance, should fix the amount of the fee, it should appear that it was done by the consent of the proper parties. An agreement that the judge should fix it, entered of record, would be a sufficient authority. In making such an entry the judge should have reasonable assurance that the agreement has the assent, as well of those who contracted to pay as of those who are to receive payment. If a plaintiff having an inconsiderable share should make an extravagant bargain, of course the court would not feel itself bound by any such engagement, but, in justice to those who will pay the greater part of the fee, will reduce it to a reasonable sum. This construction of the statute we deem necessary for the protection of parties in suits for partition; as, otherwise, attorneys might, at the heels of a term, in the absence and without the knowledge of the parties, have exorbitant and ruinous fees allowed, for which there would be no redress; as, the term being ended, the judgment could not be altered or amended at a subsequent one.

This judgment on its face not being warranted by law, as the facts do not appear which warranted the judge in fixing the amount of the fee, according to the well-settled course of decisions of this court it may be reversed on appeal or writ of error. The error being only as to costs, it will only be reversed for so much as relates to them. (2 Saun. 101.)

The law allows the commissioners one dollar and a half for every day they are employed in making partition, and their charges are to be reported to the court.

We do not know on what ground we can allow the sur-



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Wade v. McMillen.

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veyor greater fees than those prescribed by law for county surveyors. Judge Ewing concurring, the judgment is reversed and the cause remanded.

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WADE *et al.*, Plaintiffs in Error, v. McMILLEN, *et al.*, Defendants in Error.

1. A complaint in an action of forcible entry and detainer—which charges that the plaintiff was “lawfully possessed” of the premises in controversy, that the defendant “unlawfully entered and detained the same,” and was thereby guilty of a forcible entry and detainer—is good.

*Error to Hannibal Court of Common Pleas.*

This was an action for a forcible entry and detainer. The complaint is substantially as follows: “The plaintiffs complain and say that heretofore, to-wit, on, &c., at, &c., they were lawfully possessed and entitled to the possession of” certain premises [describing them]; “that being so lawfully possessed as aforesaid, the defendants, on, &c., at, &c., unlawfully entered upon said lands and tenements, and detained and held possession, and still detain and hold unlawfully the possession of said lands and tenements against them, the said plaintiffs, although possession of said premises had been demanded of said defendants; and therefore said plaintiffs say the said defendants are guilty of forcible entry and detainer, against and contrary to the statutes in such cases made and provided.”

At the trial, it appeared in evidence that one Cameron was the agent of the plaintiffs; that he had possession of the premises for plaintiffs from 1849 to 1854; that in April, 1854, one Barrow, who had rented the premises of Cameron, surrendered possession to him; that he, Cameron, fastened the doors and windows, and employed one French to sleep in the house until he could rent the premises; that defendant McMillen demanded possession of French, threatening him with a law suit and heavy costs; that French left

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Wade v. McMillen.

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and McMillen went into possession. There was evidence tending to show that French gave up the possession voluntarily to McMillen. Cameron demanded possession of the premises, but was refused. There was no evidence tending to show that he gave notice in writing. The court gave the following instruction for defendants: "1. Unless the jury find from the evidence that after the time of the alleged unlawful entry by said defendant, and before this suit was instituted, the plaintiff made a demand for the deliverance of the possession of said premises in writing on said defendant, and said defendant refused after such demand so made in writing to deliver possession, the jury will find for the defendants." The court refused to permit plaintiffs to amend their complaint by inserting therein that "defendants entered the premises and forcibly and unlawfully detained the same."

The jury found a verdict for defendants.

*Henderson*, for plaintiffs in error.

I. The instruction was erroneous. The complaint is good. It contains every allegation that the plaintiffs were bound to prove to entitle them to a verdict for a forcible entry and detainer. (R. C. 1845, p. 515, § 16; *Ish v. Chilton*, 26 Mo. 256; 26 Mo. 580, 487; 24 Mo. 107; 14 Mo. 17; 11 Mo. 354.) No notice was necessary in the case. The facts show an intrusion upon a lawful possession against the will of plaintiffs. The plaintiff's agent was driven off by threats of a prosecution and damages. The case went to the jury upon an improper theory. Whether the facts proved constitute a forcible entry and detainer is a question of fact for the jury.

*Porter & Harrison*, for defendants in error.

NAPTON, Judge, delivered the opinion of the court.

The complaint in this case follows the precise language of the sixteenth section of the act concerning forcible entry and detainer. It charges that the plaintiffs were lawfully possessed of the premises described, and that the defendants

unlawfully entered into and detained the same, and were thereby guilty of a forcible entry and detainer. The sixteenth section declares that the only proof necessary to establish a forcible entry and detainer is, that the plaintiff was lawfully possessed of the premises, and that the defendant unlawfully entered and detained the same. The terms "lawfully" and "unlawfully" are not the most appropriate to convey the ideas intended, for the action does not contemplate any investigation into the merits of the title on either side. But as these terms are used in the statute, it would seem reasonable that their use in the complaint should not vitiate it. In truth, as the complaint in this case fully described the land and the person by whom the alleged illegal entry was made, and the time when it was done, and concluded with a charge against the defendants of forcible entry and detainer, it is not perceived how any one could be misled as to its purport. It appears to us to be substantially correct under the sixth section of the act.

The instruction given by the court in this case is obviously based upon the hypothesis that the action was not for forcible entry and detainer, but for an unlawful detainer; and the instruction amounted to a direction that the plaintiffs could not recover on the evidence; for there was no proof of any demand, and the whole testimony showed that the case was one of forcible entry and detainer, or that the plaintiffs had no case at all.

The real question in the case was, whether the possession was delivered up by French, plaintiff's agent, in consequence of threats or violence on the part of defendants, or was voluntarily surrendered. This fact, concerning which the evidence might have authorized an inference either way, was not passed upon nor submitted to the jury at all, as the instruction put the case entirely upon the question of notice, a matter entirely foreign to the case, treating it as an action for forcible entry and detainer.

Judge Ewing concurring, the judgment is reversed and the cause remanded. Judge Scott absent.

BAILEY, Plaintiff in Error, v. WILSON, Defendant in Error.

1. In cases tried by the court under the practice act of 1849, there should be a finding of the facts.
2. The following is not a sufficient finding of the facts, in an action of ejectment, within the meaning of the practice act of 1849: "This cause being submitted to the court for trial, the court finds that said defendant is not guilty of unlawfully withholding from said plaintiff the possession of the premises in the petition mentioned in manner and form as therein stated; it is therefore considered by the court," &c.

*Error to St. Charles Circuit Court.*

*Broadhead*, for plaintiff in error.

I. The court should have found the facts as required by the practice act of 1849. (15 Mo. 400; 17 Mo. 550; 19 Mo. 122; 20 Mo. 132; 24 Mo. 51; 26 Mo. 166, 494; 27 Mo. 418.)

*Wells & E. A. Lewis*, for defendant in error.

I. The finding conforms to the petition. The only allegation in the petition in issue was "found" by the court in the very language in which it is stated in the petition. If the fact is correctly stated in the petition, the same fact is correctly found by the court. The word "facts" in the second section of the sixth article has the same signification as it has in the second section of the fifteenth article. The court is not bound to find more facts than the plaintiff is bound to allege. If the facts stated in the petition, when found to be true, are sufficient to entitle the plaintiff to recover, then those same facts, being all in issue, are, when found not to be true, sufficient to entitle the defendant to a judgment. If the facts are not sufficiently stated in the petition, the judgment is for the right party and should not be disturbed. They are not sufficiently stated. The plaintiff alleges that on a certain day he "was entitled to the possession of the premises." This is not simply a fact. It involves all the facts as well as

the law on which his right to recover depends. No case can be found in which a judgment for the defendant has been reversed for want of a sufficient finding.

NAPTON, Judge, delivered the opinion of the court.

This case was tried by the court under the practice act of 1849, and there was no finding of facts. The entry upon the record is: "This cause being submitted to the court for trial, the court finds that said defendant is not guilty of unlawfully withholding from said plaintiff the possession of the premises in the petition mentioned, in manner and form as therein alleged. It is therefore considered by the court," &c.

We understand this is a mere verdict of "not guilty" in an action of trespass in ejectment, and no more constitutes such a finding of facts as was contemplated by the practice act than if the court had found simply "for the defendant." The statute says: "Upon a trial of a question of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts shall first be stated and the conclusions of law upon them." The object of the act was manifestly to enable parties to make a case for the revision of this court, in which the facts and law would separately appear, without requiring instructions and bills of exceptions. This purpose would be entirely defeated if the verdict of the court merely affirms or negatives the allegations of the petition or answer.

It is urged in this case that, as the verdict was for the defendant, the practice heretofore prevailing in this court, to send the case back for a finding, is inapplicable and inappropriate. But we can not see any ground for such a discrimination.

Judge Ewing concurring, judgment reversed and cause remanded. Judge Scott absent.

## WYATT, Appellant, v. THOMAS, Respondent.

1. It is not obligatory upon commissioners appointed by a county court to lay out a county road to call to their aid the county surveyor or other competent surveyor; it is sufficient if the commissioners by their report designate the location of the road with sufficient certainty.

*Appeal from Montgomery Circuit Court.*

This was an action to recover damages for a trespass in throwing down plaintiff's fences and exposing his fields so that his crop was destroyed and his stock went astray. The defendant justified on the ground that he was a road overseer and that the fences thrown down were in the public highway. The commissioners who made the location of the road did not call to their aid a survey, and no survey was made.

*Wells*, for appellant.

I. The report of the commissioners or the survey must give a definite and ascertainable location to the road. The report and survey constitute a record. If they lack certainty, then they are void. The report is utterly indefinite and uncertain. The oral testimony introduced conflicts with the report. The court erred in refusing to give the first two instructions prayed for by the plaintiff.

*Lovelace & Terrill*, for respondent.

I. The report designates with sufficient certainty the location of the road. (See 18 Mo. 357; 24 Mo. 298.) The court properly refused the instructions asked. The only question was whether the road was opened on the line designated by the commissioners.

NAPTON, Judge, delivered the opinion of the court.

In the case of *Walker v. Likens*, 24 Mo. 298, an owner of land was not allowed to maintain trespass against an overseer of a road, who was acting under the orders of the county



court in proceeding to open a road over the land of the party complaining, although it did not appear, from the report of the commissioners who laid out the road, that the complaining owner had consented to the road going over his land, or that the proper steps had been taken to condemn the land to public uses, as in cases of the owner's refusal. Here was a case where a constitutional safeguard had been set at naught; but the remedy was not considered to lie in an action against the officers, who were but acting in conformity to the orders of a court having jurisdiction over the subject.

The present suit is against the overseer of a road district for opening a road across plaintiff's land under orders of the county court, and the liability of the defendant is attempted to be placed upon the vague and indefinite character of the report of the commissioners who located the road, which is supposed to invalidate it and make the order based on it no protection to the officer. But conceding its deficiencies, it is not perceived how they could have any greater efficacy in vitiating the proceedings of the officers, who undertook to execute the orders of the court, than the omissions which occurred in the report and action of the commissioners in the case to which we have alluded.

The statute does not require the road to be surveyed. It is left to the discretion of the commissioners whether they will employ a surveyor and the necessary assistants. In a great number of cases, we know such is not the practice; and in all these cases, when there is no actual survey, the description of localities, courses and distances must necessarily be somewhat vague, and the designated route is chiefly ascertained from the stakes set or the trees blazed.

Whether the line of the road, as reported in this case, actually passed over the plaintiff's enclosure and required the removal of his fence, was a question for the jury.

Judge Ewing concurring, judgment affirmed. Judge Scott absent.

WALLER *et al.*, Appellants, v. MARDUS *et al.*, Respondents.

1. The mere right of a widow to dower before an assignment to her is not such an interest or estate as can be levied on and sold under an execution against her or a subsequent husband; the dower must first be assigned to the widow.
2. Should the mere right of a widow to dower before assignment be levied on and sold under a judgment against a subsequent husband, the purchasers would not be creditors within the meaning of the thirty-first section of the dower act of 1845 (R. C. 1845, p. 435), or the thirty-eighth section of the dower act of 1855 (R. C. 1855, p. 676.)

*Appeal from Monroe Circuit Court.*

Demurrer to a petition. From the petition it appeared that Nathan H. Mardus died in the year 1853, seized and possessed of certain real estate, leaving a widow, Parmelia Mardus, and children. In 1855 said widow intermarried with Solomon Stickell. Certain creditors of said Stickell obtained judgments against him for debts contracted after said intermarriage, and executions were issued thereunder, and his interest in his wife's dower interest in said real estate was levied on and sold, and the plaintiffs became the purchasers. The plaintiffs pray that the dower interest may be assigned to them, and that commissioners be appointed to assign the same. The court sustained the demurrer.

*Carr & Pindall*, for appellants.

I. The widow continued in possession after the death of her husband. Her second husband continued in possession until the sale by the sheriff. She was entitled to possession until the assignment of dower. The estate was a freehold for life unless sooner defeated by the petition of some one of the parties named in the thirty-first section. (R. C. 1845, p. 435; 3 Halst. 129.) A widow may assign her dower right, and possession may be recovered by ejectment. (Stokes v. McAllister, 2 Mo. 163.) If she had become indebted during her widowhood, her creditors might have obtained judgment against her, and levied on and sold her interest. It



may be subjected to the payment of the debts of her second husband contracted after marriage. (2 Harr. & Gill, 443.) Upon the marriage to Stickell, he became seized, *jure uxoris*, of the freehold interest vested in her, and it became subject to the payment of his debts. (27 Mo. 140; 20 Mo. 271; Bright on Husband and Wife, 136; R. C. 1855, p. 740, 753; 16 Mo. 129; 17 Mo. 394, 519; 5 Blackf. 309; 2 Pick. 316; 2 Rand. 120.) The husband's interest in the wife's dower may be sold previous to an assignment. The plaintiffs became substituted by their purchase to all the equity and rights of the husband's creditors. They are brought within the meaning of the thirty-first section of the dower act. (Rankin v. Harper, 23 Mo. 579; Eddy v. Baldwin, 23 Mo. 588.) The sheriff's sale operated as an equitable assignment of Stickell's interest. Plaintiffs are substituted to the rights and equities of the husband. (4 Rawle, 468.)

*Howell*, for respondents.

I. The interest of the widow of Mardus was a mere right to have dower assigned. It was not a vested interest in specific land. It is not averred in the petition that the land was the mansion house of the former husband, or the messuages or plantation thereto belonging. She had no right of possession. There was no assignment to the widow. Besides, it is not her interest that was levied on and sold. It was that of her husband. (10 Mo, 746; 14 Mass. 378; 5 Greenl. 479; 1 Co. Litt. 584; R. C. 1855, p. 672, 676, § 21, 38.)

SCOTT, Judge, delivered the opinion of the court.

This is a suit, by purchasers under an execution at a sheriff's sale, against a former widow and her husband, to have her dower in her first husband's estate assigned to them. N. H. Mardus was seized of lands, and died, leaving Parmelia Mardus his widow, who was entitled to dower in his estate, but which was never assigned to her. She, Parmelia, intermarried with the defendant Solomon Stickell, who during the marriage contracted debts for which he was sued, and,

judgment having been recovered, afterwards executions issuing to Monroe county, Mrs. Stickell's dower interest in her former husband's estate was sold, and the plaintiffs became the purchasers. On these facts judgment was rendered against the plaintiffs.

The wife being seized of a life estate in her own right, her interest may be sold for debts contracted by her husband during the coverture for so long a time as the marriage may subsist. But it is well settled that until dower is assigned the widow has no estate in the land for which an ejectment may be maintained, or which can be sold under execution. Her interest, until dower is assigned, is a mere chose in action. Whether she could by a voluntary assignment of this chose in action enable her assignee to sue in equity to have the dower assigned is not a question involved in this case. By the statute in force at the time of the first husband's death, and which still is the law, a creditor of the widow or of her husband may have her dower assigned. But the plaintiffs can not be regarded as creditors within the meaning of the act. The law will not suffer the widow's dower to be assigned in a way which in many cases may prove detrimental to her. If the dower interest is permitted to be sold under execution before it is assigned and the purchaser shall be compelled to go to law in order to have it allotted to him, the uncertainty whether it would ever be assigned would inevitably cause a diminution of price, which would not occur if the dower was assigned before the sale took place. To sell the right of dower at public auction and then have it assigned, the purchaser taking the risk whether it will be assigned or not, would generally cause a sacrifice of it. The creditor should have the dower actually assigned before it is sold.

The plaintiffs, who were purchasers at the sheriff's sale, can not be regarded as assignees of the interest and entitled therefore to go into equity to have the dower assigned to them. Besides the objection above stated to a sale of dower before it is assigned, the interest of the widow being such

that it could not be sold under execution, it is impossible that the plaintiffs could have acquired any right under the sheriff's deed, as it was merely void. Although the plaintiffs may have given its value for the dower interest in this case, yet, as our experience teaches us that such a mode of disposing of dower must produce sacrifices, the rule must be uniform, and it can not be made to depend upon the amount realized by the sale. The purchasers can not be regarded as creditors and be substituted in place of the plaintiffs in the execution, as the right to substitution, which is founded on equitable principles, can not be claimed when its allowance would contravene the policy of the law. There should be legislation on this subject such as would protect innocent purchasers at sheriff's and other public sales from loss when the title to the property which they have bought fails, or there is a defect in the conveyance of the sheriff or other agent, which renders it void. In cases free from fraud and from all design to overreach, there would be justice in permitting the innocent purchaser to be substituted to the amount of his bid in the place of the execution or other creditor.

There is nothing in the record which shows that the widow was entitled to quarantine in the land, for which, under our statute, she would have been entitled to maintain an ejectment.

The judgment is affirmed; the other judges concurring.



LINEY *et al.*, Plaintiffs in Error, v. MARTIN, Defendant in Error.

1. Where different causes of action are joined in the same petition, they must each affect all the parties to the action.

*Error to Ralls Circuit Court.*

This is an action by Thomas Liney and Juliana his wife, and Sarilda J. Newcome, a minor, against William Martin.

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Liney v. Martin.

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The petition is substantially as follows: Plaintiff states that James Newcome, in the year 1837, was the owner of three several tracts of land [describing them]; that in June, 1837, he intermarried with one of the plaintiffs, Juliana Liney, then Crockett; that afterwards, in July, 1837, he sold two of said tracts to defendant and conveyed the same by deed of that date, in which deed said plaintiff relinquished her dower at the solicitation of her husband and the defendant; that afterwards, in August, 1837, said Newcome abandoned his wife Juliana and went to Texas and there resided; that in 1841 she obtained a divorce from him and in April, 1842, intermarried with the plaintiff Thomas Liney; that Sarilda J. Newcome is the daughter of the plaintiff and the sole heir of the said Newcome; that he died in Texas about 1850; that the said Newcome, with intent to defraud the plaintiff Juliana and to deprive her of her right of dower and then abandon her forever, induced her to sign said deed and to relinquish her dower; that defendant confederated with the plaintiff and made a pretended purchase with the intent to defraud plaintiff of her dower; that no part of the pretended purchase money was paid by said Martin to said Newcome at the time or since; that Newcome abandoned her for many years, and that after the divorce was granted, and in 1845, he returned and sold a part of the lands and offered the balance for sale with the full assent of defendant, and claimed them as his own with the like assent of defendant. Plaintiffs aver that the land in his lifetime was held in trust by defendant for said Newcome; that at his death it descended to the plaintiff Sarilda as his heir; that defendant paid no consideration whatever, but held as aforesaid; that in 1851 defendant, in fraud and violation of said trust, sold one of the tracts to one Bridgford; that this tract so sold was worth one thousand dollars; that defendant still holds one of said tracts under said conveyance. The plaintiffs pray that the said conveyance may be set aside for fraud, or that the defendant be held as trustee for the said Juliana and Sarilda in said land, and in the sum of one

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thousand dollars, with interest from February 7, 1851; and that he be held to account for rents and profits of the land now in possession, and for waste, and that the land be decreed to plaintiffs according to their respective rights. The court sustained a demurrer to the petition.

*Pratt*, for plaintiffs in error.

I. The facts show that the defendant holds the lands and money in trust. On the death of Newcome they descended to the plaintiff Sarilda as his heir. This is admitted by the demurrer. The facts being admitted, it follows that the dower attaches to the property in favor of Juliana.

*Broadhead*, for defendant in error.

I. There is a misjoinder of parties and of actions. The same causes of action do not affect both parties to the action.

EWING, Judge, delivered the opinion of the court.

The question in this case involves the sufficiency of the petition. It is urged that there is a misjoinder of parties and actions in the petition, and that the same causes of action do not affect both parties to the action.

From the statement of the case, it is seen that the cause of action, as it respects plaintiff Juliana Liney, was an alleged collusion between James Newcome, deceased, her former husband, and the defendant Martin, with the intent to defraud her of her dower interest in the real estate mentioned in the petition, and that it was consummated by a pretended and fraudulent conveyance of said lands to the defendant. As it respects the plaintiff, Sarilda J. Newcome, the minor heir of said James Newcome, the petition alleges that the same land was held by defendant *in trust* for said James Newcome in his lifetime, and that at his death it descended to plaintiff Sarilda J. as his heir; that in fraud and violation of the trust defendant sold one of said tracts, which is described, to one Richard Bridgford, who holds the same,

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and that defendant still holds another of said tracts under the conveyance aforesaid.

In the classification of actions, under the practice act, that may be united in the petition, the plaintiff is restricted to such as arise out of, *first*, the same transaction; or, *second*, contract, express or implied; or, *third*, injuries with or without force to person and property, or either; or, *fourth*, injuries to character; or, *fifth*, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, *sixth*, claims to recover personal property, with or without damages for the withholding thereof; or, *seventh*, claims by or against a party in some representative or fiduciary capacity by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action. (R. C. 1855, p. 1228.)

So far as the petition shows any cause of action in favor of the plaintiff Sarilda J. Newcome, it is obviously such a one as appropriately belongs to the seventh subdivision of the section just quoted. Upon the facts stated in the petition, no trust could arise in favor of the heir, unless the conveyance was executed *bona fide* to the defendant Martin as trustee, either for herself or for her father. If, as is alleged, the land was held by the defendant as trustee for plaintiff's father, then she can claim only such right in the land as her father had, and she would be estopped from impeaching his conveyance on the ground of fraud. As he could not allege his own fraud, nor impeach his own deed on that ground, neither can the plaintiff as his heir. The right of action of the heir being thus based upon the ground of a trust created and arising upon a conveyance, which, to authorize a recovery, must be presumed valid and untainted with fraud, it follows that it could not be joined with a cause of action arising out of a transaction alleged to be fraudulent and based distinctly upon that ground. This is manifestly the case of plaintiff Juliana Liney. It is based solely upon



the ground of a collusion between Newcome and defendant Martin, and a fraudulent conveyance of the property in controversy with the intent to defraud her of her dower. The judgment will be affirmed; Judge Napton concurring. Judge Scott absent.

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THE STATE, Respondent, v. ROSS, Appellant.

1. Where three persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, and the one indicted as principal in the first degree is put upon his trial first and acquitted, the record of his acquittal is inadmissible in evidence in favor of the others.
2. Where several persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, each defendant may be tried as principal either in the first or second degree.
3. Where a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree, and a new trial is ordered at his instance, he can not legally be put upon his trial again upon the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree. (Scott, Judge, dissenting.)
4. To authorize the giving of instructions, there must be facts in evidence upon which to base them; nor should they contain comments upon the testimony.
5. In the case of a joint indictment of several for the joint commission of a crime, when once the conspiracy or combination is established, the act or declaration of one conspirator in the prosecution of the common enterprise is admissible in evidence against all. Acts or declarations of one, made after the common enterprise is ended, whether by accomplishment or abandonment, are not admissible in evidence against the others.
6. The rule requiring *prima facie* proof of the conspiracy or combination to be first made before the act or declarations of one conspirator or accomplice can be admitted against the others is not inflexible; the judge may, in his discretion, under peculiar and urgent circumstances, permit such acts and declarations to be introduced before sufficient proof is given to establish the conspiracy or combination.
7. The ninth section of the first article of the act concerning jurors (R. C. 1855, p. 910), which provides that "no exception to a juror on account of his citizenship, nonresidence, state, or age, or other disability, shall be allowed after the jury are sworn," does not apply to the objection that the juror had formed or delivered an opinion on the issue or any material fact to be tried; if the latter objection be made on a motion for a new trial, the court must entertain it.

*Appeal from Madison Circuit Court.*

Sullivan Phillips, Presley Phillips and John L. Ross were indicted for the murder of Robert G. Watson. The indictment contained only one count charging murder in the first degree, Sullivan Phillips being indicted as principal in the first degree, the others as aiders and abettors. Sullivan Phillips was put upon his trial first and acquitted. Presley Phillips and Ross were then put upon their trial and found guilty of murder in the second degree. This verdict was in the following form: "We, the jury, find the defendants, Presley Phillips and John L. Ross, guilty as principals in the second degree of murder in the second degree, and assess their punishment each at ten years' imprisonment in the penitentiary." They appealed to the supreme court and the judgment against them was reversed. (See *State v. Phillips and Ross*, 24 Mo. 475.) There was a severance as to the defendants. Ross filed a plea setting up the former implied acquittal of murder in the first degree as a bar to any further prosecution for that grade of offence. The State demurred to this plea. The demurrer was sustained, and the defendant was put upon his trial upon the whole indictment. On the trial the defendant offered in evidence, as on the former trial of Phillips and Ross, the record of the acquittal of Sullivan Phillips, the actual perpetrator of the homicide. The court refused to admit the record.

The instructions given and refused are very voluminous. It is deemed unnecessary to set forth those that are not noticed in the opinions below. The court, among other instructions asked by the defendant, refused the following: "4. The jury are instructed that in determining whether there was or was not any conspiracy or common design of any sort between John L. Ross, Presley Phillips and Sullivan Phillips, or either of them, the jury have no right to consider any declarations which Presley may have made to Shelton on Monday, or to Bishop or Shultz on Wednesday, in the absence of John L. Ross; nor have the jury a right, in determining whether



there was or was not such conspiracy or common design, to consider any declarations which may have been made by Presley Phillips to Shultz on the gallery, or to his slave, unless the jury are satisfied from the evidence that these two latter declarations of Presley Phillips were in the presence and hearing of John L. Ross. The jury can not consider any declarations of Presley Phillips made in the absence of John L. Ross in order to determine whether such conspiracy or common design existed. If the jury shall be satisfied from the other evidence in the cause that such conspiracy or common design existed before the act of killing, then and not till then do these declarations of Presley Phillips become evidence against John L. Ross. 5. If the jury shall find from the evidence in the cause that Sullivan Phillips killed Robert G. Watson, and that he did the act upon his own independent motion, and not in the execution of any conspiracy or common design to which John L. Ross was a party, they ought to acquit the defendant John L. Ross, no matter whether the act of Sullivan Phillips in killing said Watson was justifiable or not."

The court gave the following instructions at its own instance: "5. If the jury believe that there was no common design between Presley Phillips, Sullivan Phillips and John L. Ross to kill Robert G. Watson nor to do him any great personal injury, and that there was no conspiracy or confederacy between them to go through the lands or enclosure of the deceased [?] of any or all opposition that might be made, and that Sullivan Phillips shot and killed Robert G. Watson, and that John L. Ross did not aid and assist or abet Sullivan Phillips to kill Robert G. Watson, and did not intentionally encourage Sullivan Phillips, by his presence, acts or declarations, to commit the act, then the jury ought to acquit John L. Ross of the charge of murder. Every person is presumed to intend the necessary consequences of his acts, but such presumption may be rebutted by other evidence. 6. By the term 'common design' is meant unity of intention between two or more persons to do an unlawful act, and may be es-

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tablished by circumstances or by direct evidence of an express agreement. 15. If the jury believe from the evidence in this cause that there was no common design between Presley Phillips, Sullivan Phillips and John L. Ross (at the time Sullivan Phillips shot and killed Watson) to go through the enclosure of Watson against all opposition, and that there was no common design between them to kill Watson, nor to do him any great personal injury, and that Sullivan Phillips shot and killed Watson, and that there was no common design between them to wilfully and maliciously pull down the fences of Watson, then John L. Ross is not to be affected by any conversation Presley Phillips may have had with Shelton, Bishop, or any other person, in the absence of John L. Ross; and under these circumstances the jury are to discard it from their consideration in determining the guilt or innocence of the accused; but it is not material that such common design existed at the time said conversations took place. If such common design existed at the time Watson was killed, the jury ought not to discard said conversations with Bishop and Shelton from their consideration in determining the guilt or innocence of the accused."

The court gave no instructions as to the law of murder in the second degree. The jury found the following verdict: "We, the jury, find the defendant John L. Ross not guilty of murder in the first degree in manner and form as he stands charged in the indictment; but we do find him, John L. Ross, guilty of murder in the second degree in manner and form as he stands charged in the indictment, and we assess his punishment to ten years' imprisonment in the penitentiary."

Among the reasons for a new trial was the following: that one of the jurors "prejudged the case, and concealed his opinions and prejudices from the court and defendant, and answered untruly to the court the questions put to him by the court when examined as to his qualifications as a juror; and because this prejudgment was unknown to defendant until after verdict, as may be more fully seen by reference to

the affidavits of," &c. The action of the court in respect to this ground for a new trial is sufficiently set forth in the opinion of the court.

*U. & J. Wright, Lackland, Cline & Jamison*, for appellant.

I. The court erred in sustaining the demurrer to the defendant's plea in bar. If the record did not show that defendant had been acquitted as alleged in the plea, the only proper mode of revising that question was by replication of *nul tiel record*.

II. The record of the acquittal of Sullivan was competent evidence to go to the jury for what it is worth. It establishes to all the world, as well strangers as parties and privies, that Sullivan Phillips was not guilty of any offence, and consequently that Ross could not be guilty as a principal in the second degree of a murder or other offence committed by Sullivan Phillips; which was the very theory and hypothesis of the prosecution. The record was not conclusive, because under the indictment the State might have established the guilt upon some other theory or hypothesis. The acquittal of Sullivan Phillips conclusively negatives the hypothesis that he committed any offence; consequently neither defendant nor any one else can be guilty as an aider and abettor of Sullivan Phillips. (State v. Chilton, 2 Dev. 54.)

III. The court erred in permitting the witnesses Shelton, Bishop and Shultz to state in evidence what was said to them by Presley Phillips, on Monday and Wednesday, in the absence of Ross.

IV. The court erred in refusing to instruct the jury, as asked by defendant, that the declarations of Presley Phillips, as testified to by Shelton, Shultz and Bishop, made in the absence of defendant Ross, were incompetent to prove that he was a party to any conspiracy or common design. The court gave no instruction covering this principle. (See 1 Greenl. Ev. § 233, 110, 111; United States v. Gooding, 12 Wheat. 460; 1 Moody C. C. 347; 6 Q. B. 126; 1 Stark. 82; 7 Mo. 414; Colly. on Part. § 776; 10 Johns. 66; 5 Pick.

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414; 7 Wend. 216; 6 Pick. 464; 14 Pick. 61; 6 N. H. 82; 9 Metc. 457; 14 Johns. 215; 2 Hall, 351.)

V. By the verdict of the jury on the former trial the defendant was acquitted of murder in the first degree, and it was error in the court to put him on trial a second time for that offence, and all the instructions given by the court upon the subject of murder in the first degree were improper and illegal. The legal effect of the first verdict was to acquit defendant of murder in the first degree, and the reversal of the judgment based upon that verdict in nowise impairs the validity of the acquittal of murder in the first degree. (*Jones & Jones v. State*, 11 Texas, 183; *Campbell v. State*, 9 Yerg. 333; *Slaughter v. State*, 6 Hump. 410; *People v. Gilmore*, 4 Cal. 376; *State v. Hornsby*, 8 Rob. 588; *State v. Desmond*, 5 Louis. Ann. 399; *State v. Chandler*, 5 Louis. Ann. 491; *Hunt v. State*, 25 Mo. 378; *Brennan v. People*, 15 Ill. 517. See 1 Blackf. 37; 3 Hill, 239; 1 Ired. 424; also *Dickey v. Commonwealth*, 17 Penn. 126; *Esmond v. State*, 1 Swan, 14; 7 Conn. 56; 1 Greene, 362; 5 Port. 523; 17 Wend. 386; 2 Harring. 543; 2 Hawks, 98; 6 Term, 638; 14 Ohio, 295; 2 Yerg. 24.)

VI. The fifth instruction is erroneous. The latter part of this instruction, though abstractly correct, was inapplicable to the facts. It was calculated to mislead the jury. The effect of it was the same as a commentary on the weight of the evidence. (See *State v. Kempf*, 2 Mo. 429; *State v. Phillips and Ross*, 24 Mo. 475; *Hays v. Bell*, 16 Mo. 496; *Oliver v. State*, 7 Ala. 597; *McDermot v. Burnum*, 19 Mo. 204; *Glover v. Duhle*, 19 Mo. 710; 3 Bibb, 482; *Hollister v. Johnson*, 4 Wend. 639; *Mercien v. Mack*, 10 Wend. 461; *Haine v. Davy*, 4 Ad. & El. 899; 17 Mo. 142; 1 Mo. 618; 8 Mo. 268.) The seventh, eighth, ninth, tenth, twelfth, thirteenth and fourteenth instructions are all wrong. The fifteenth instruction is wrong because it refers to the jury the question whether the declarations of Presley Phillips were competent evidence. (See 6 Mo. 267, 279; 15 Mo. 62; 11 Mo. 230.) Where, from the absence of proper instructions,

the jury fall into error, a new trial will be granted. (1 Wash. C. C. 201.) The jury did not err in favor of the defendant, because he had been acquitted of murder in the first degree. The opinion of the court in the case of State v. Phillips and Ross shows beyond all doubt that there is no murder in the second degree in the case. (24 Mo. 489.) There is no legal evidence to support a verdict of murder in the second degree. (See State v. Packwood, 26 Mo. 363; State v. Gresser, 19 Mo. 247.)

VII. The court erred in deciding that the statute prohibited an inquiry into the question whether defendant was defrauded out of a fair trial by the conduct of the juror. The question raised by the tenth reason for a new trial does not involve the right of challenge at all. (See generally 9 Denio, 203; 1 Bay, 373; 19 Ohio, 198; 3 Scam. 412; 2 Salk. 645; R. C. 1855, p. 1191, § 15, p. 910, § 289; 18 Mo. 428.)

*Mauro*, (circuit attorney,) and *J. W. Noell*, for respondent.

I. There was no error in putting defendant again on trial for murder as if no verdict had been rendered. The constitutional provision which exempts a party from being put twice in jeopardy is a personal right and privilege. It has no application to the case of an erroneous judgment which the accused at his own instance causes to be set aside. The defendant has not been injured. If the former verdict is still in force so far as it acquitted the defendant of murder in the first degree, still, the verdict in this case not being for murder in the first degree, the accused has no ground for complaint.

II. There is no error in the overruling of that point in the motion for a new trial which involves the propriety and legality of the verdict for murder in the second degree. It was a proper case of murder in the second degree as to Ross. The court refused to give any instructions upon the hypothesis of murder in the second degree. The defendant asked no instruction to negative that hypothesis. (See State v. Green, 13 Mo. 383.)

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III. There is no such proof of misconduct on the part of the jury as will warrant the interference of this court with the ruling of the circuit court on this point. (See 1 Robin. 735 ; 1 Leigh, 617.) There was no error in the refusal of defendant's instructions, nor in those given by the court.

EWING, Judge, delivered the opinion of the court.

Among the exceptions to the ruling of the court below was excluding the record of the acquittal of Sullivan Phillips. It is conceded that the record was not conclusive evidence of defendant's innocence, but that it conclusively negatives the hypothesis as against Sullivan Phillips that he committed any offence, and consequently that defendant and no one else can be guilty as his aider or abettor.

In the *State v. Phillips and Ross*, 24 Mo. 480, one of the points made was, that the acquittal of Sullivan Phillips, the principal in the first degree, operated in law the discharge of the defendants from the indictment, and the court ought to have discharged them on motion. On the trial the question was raised, first, by a motion for a discharge before any evidence was offered, and afterwards by offering the record of the acquittal of Sullivan Phillips as evidence in chief. It was held that as against the defendants in that case, Phillips and Ross, the question of the guilt or innocence of Sullivan Phillips was still open ; that his acquittal did not operate their discharge, and that, though Sullivan Phillips was the actual perpetrator of the homicide, the record of his acquittal would be inadmissible in evidence in favor of Phillips and Ross, the defendants.

If it be true, as assumed by counsel, that, Sullivan Phillips having been acquitted, the defendant Ross can not be his aider and abettor, still, admitting the conclusion to be correct, it can not avail the defendant. To give him any benefit of such a hypothesis, it must also be true that he could not under the law be put upon his trial as a principal in the first degree. This the argument does not and could not



assume. The proposition is not thus broad, and does not embrace the conditions from which such a conclusion could possibly be drawn. Unless the proposition affirmed that, as between Sullivan Phillips and the defendant, the relation of principal in the first and second degree, or principal and aider and abettor was fixed, and that in their trial under the indictment this relation must be observed, as a matter of law, then and then only could the acquittal of Sullivan Phillips enure to the benefit of the defendant, and the record of acquittal be admitted as evidence in his favor.

The position of counsel assumes that Sullivan Phillips was the principal in the first degree because he is so charged; and the assumption necessarily involves the conclusion sought, that of the dependent or accessorial guilt, if guilty at all, of the defendant. It is true he is so charged in the indictment, but he may have been tried as principal in the first or second degree, and his acquittal is equally conclusive in his favor as to both aspects of the charge. It is quite immaterial that on the trial the theory of the prosecution may have been that he was guilty, if guilty at all, as principal in the first degree. The theory of the indictment under the law is, that the parties to it are all principals and all aiders and abettors. Though jointly charged so as to show nominally a dependent offence as to two of them, yet their relative positions in point of law are wholly immaterial. The one charged as principal in the first degree may be convicted as principal in the second degree, and *vice versa*.

The case of the State v. Chilton, 2 Dev. 57, cited by counsel, is inapplicable. There the prisoner was indicted as an accessory before the fact to a murder of which the principal had been previously convicted. On the trial of the accessory, the record of the conviction of the principal was offered by the State and admitted against the objection of the prisoner. It was held to be admissible for the purpose of proving the conviction of the principal, of which it was conclusive, and was *prima facie* evidence of the guilt of the accessory. It was read for the purpose of establishing the fact that a

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murder had been committed by the principal as a prerequisite to the trial of the accessory; for, without this proof of the murder, the prisoner could not have been tried as accessory. The offences were different; the principal was guilty of one offence and the accessory of another; and the record of the conviction of the former was no proof of the guilt of the latter, and was not read for that purpose. It is obvious there is no analogy between the two cases. In the one case, the record was admitted to prove a fact without the previous proof [of] which the accessory could not have been tried; in the other, it was offered as evidence of a fact which, if proved, could not have enured to the benefit of the defendant. There was no error, therefore, in excluding it.

Another question presented by the record is whether the appellant, after having been put upon his trial for murder and found guilty of murder in the second degree, and a new trial granted, could have been legally tried again for the higher grade of homicide.

For the appellant, it is maintained that the legal effect of such verdict is a bar to any further prosecution for murder in the first degree, and that the reversal of the judgment upon that verdict in nowise impairs the validity of the acquittal of the higher offence. On the part of the State, it is urged that the constitutional provision, which exempts a party from being put twice in jeopardy, is a personal right or privilege, and that it has no application in the case of an erroneous judgment which the accused at his own instance causes to be set aside; that, if the former verdict is still in force so far as it acquitted the appellant of murder in the first degree, still, the verdict in this case being for a lower grade of offence, he is not injured, and has no cause of complaint.

In this case the verdict is for murder in the second degree, and it expressly finds not guilty of murder in the first degree. But without any such express finding this would have been the effect of the verdict. (*State v. Ball*, 28 Mo. 327.) In that case it was held that a verdict of murder in the se-



cond degree, by necessary implication, finds not guilty of the higher offence, and that a conviction of murder in the second degree necessarily acquits of murder in the first degree. The only question therefore is whether, the appellant having obtained a new trial, the whole case should have been reopened and a retrial had upon the whole indictment.

Numerous authorities have been cited from various states, which, with two or three exceptions, concur in the doctrine that the effect of a new trial in such cases is only to subject the party to a trial for the offence of which he has been convicted; and the verdict of acquittal remains unaffected. The same principle is also recognized by the English authorities to which we have been referred.

In *Lithon v. The Commonwealth*, 2 Virginia Cases, 311, the indictment contained five counts, the first four charging embezzlement, and the fifth larceny. The defendant was tried and convicted under the last count. Upon a petition for a writ of error to the general court, it was held that where there are several counts in an indictment, and on one of them the prisoner was convicted and acquitted of the rest, and on a writ of error obtained by him the judgment and verdict are set aside and a new trial awarded, he can only be tried again on the count on which he was convicted and not on the others of which he had been acquitted. In delivering the opinion of the court, the judge observes that the authorities, English and American, prove that, in an action against several in form *ex delicto*, if some be acquitted and a verdict against others, such verdict may, upon the motion of the defendants against whom it was rendered, be set aside as to them and stand good as to those who are acquitted. This, he remarks, proves that the verdict is not that strictly entire thing which has been supposed; that no difference in principle exists between its being severed as to parties and severed as to counts. Each count is a separate indictment, and in legal contemplation is an indictment for a separate offence. To the same effect is the *State v. Kettle et al.*, 2 Tyler, 472. The same doctrine was recognized and

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applied in *Campbell v. The State*, 9 Yerg. 335, a case similar to that cited from Virginia. The defendant in that case was indicted in several counts for larceny, and being convicted upon one and acquitted as to the others, he obtained a new trial, and being again put upon his trial on the whole indictment. This was held to be erroneous. In delivering the opinion of the court, Judge Green maintains the right of the defendant to a new trial in such cases, unembarrassed by the counts as to which there was an acquittal, and without reopening the whole indictment, upon the well settled principles of criminal pleading and practice; upon the principle that every count in an indictment contains a charge of a distinct offence, and that, by the known analogies between the joinder of different offenders and different offences against the same individual, there may be a verdict of guilty upon some counts and not guilty upon others; that it is well settled, where several defendants are tried at the same time and some acquitted and others convicted, a new trial may be granted as to those convicted without setting aside the entire verdict. The conclusion deduced from these principles and the rules growing out of them is, that, where there are several counts and a conviction upon some and an acquittal as to others, a new trial does not subject the party asking it to a trial upon the counts as to which he was found not guilty. Upon this point the judge remarks that "it is not necessary to determine how far a party could be held to even an express waiver of the benefit of a verdict of acquittal. It is enough that in this case he has not done so. He moved for a new trial. We are not to suppose his application was more extensive than his necessities. As he had been acquitted upon two counts, he could have no motive to ask for another trial except upon the one on which he was found guilty, and we are not to understand his application as going further." It is further observed, that, although in granting a new trial the verdict was set aside, and that this improperly revived the proceedings upon those counts on which the defendant

was acquitted, it was error to try the defendant a second time upon the counts as to which he was acquitted.

The case of the People v. Gilmore, 4 Cal. 376, is an authority strongly in point. The defendant was indicted for murder and was convicted of manslaughter. The verdict was set aside on the prisoner's motion, and a new trial awarded. On the second arraignment of the prisoner upon the indictment, he pleaded a former acquittal. Under these circumstances, it was held that to a second trial for murder, upon the same or a different indictment, the defendant could plead the former conviction of manslaughter as an acquittal of the crime of murder, and that he could be again tried and convicted of manslaughter under the same indictment. See also The State v. Hornsby, 5 Louis. Ann. 588, where the same point is decided, the court holding that the verdict of manslaughter was a virtual acquittal of the charge of murder, for which grade of homicide the accused could not have been again constitutionally put on his trial under the first indictment or a second. In Slaughter v. The State, 6 Humph. 413, the doctrine of Campbell v. The State was reaffirmed as to the effect of the first verdict upon a second trial. But it is well to refer to it more particularly as an authority, not only upon the point we are considering, but also for its sound reasoning upon a question growing out of that decision. In this case the defendant was indicted for murder in the first degree, and he was convicted of manslaughter, but found not guilty of murder as charged in the indictment. A new trial being granted and the verdict set aside, the defendant filed a plea of *autre fois acquit*, to which there was a replication. Defendant rejoined; and it was determined that he was not fully acquitted of the felony. There being a trial, he was again convicted of manslaughter. The indictment being for murder in the first degree, it contained by operation of law a charge of every grade of a felonious homicide. The question was whether the defendant should have been put upon his trial a second time upon the indictment. In answering

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the objection that the defendant could not properly be tried again for manslaughter on the indictment, because it contained a charge of murder and the jury might have found him guilty of murder, Judge Green, in delivering the opinion, remarks that it would be just as easy for the court, on an indictment for murder, to direct the jury to confine their inquiry to the charge of manslaughter as to direct them to confine their inquiry to one count of an indictment containing several counts. He further remarks that the order granting a new trial may have had the effect of setting aside the entire verdict, but, as the verdict of acquittal of murder protected the defendant by the constitution from any subsequent trial for that offence, the court, at the subsequent trial, having the whole record before him, was bound to see that he was protected, and to regard so much of the order setting aside the verdict as a nullity. See also *Esmon v. The State*, 1 Swan, 15.

In the case of *Jones and Jones v. The State*, 13 Texas, 184, the same point was decided upon a full review of the adjudged cases, and, in the opinion of the court, delivered by Judge Lipscomb, he states as the result of his investigation, that, both on principle and authority of adjudged cases, the appellants, after having been acquitted of murder in the first degree and found guilty of murder in the second degree, could not be legally tried and convicted of murder in the first degree, and that the verdict so finding them can not stand as the basis of a judgment and execution thereon. To the same effect is *Hunt v. The State of Mississippi*, 25 Miss. 381, which was an indictment for murder and a conviction of manslaughter in the third degree. Upon a writ of error for refusing a new trial, the court, in a well considered opinion by Judge Fisher, decide that in such a case the jury, in contemplation of law, render two verdicts, the one acquitting the accused of the higher crime charged, the other finding him guilty of an inferior crime; that the verdict in the defendant's favor is unaffected by a reversal of the judgment, and that neither he nor the State could ask a revision of such

a judgment, and that, having no power to revise it, there was no authority in the court to reverse or annul it. In *Brennan et al. v. The People*, 15 Ill. 517, the same doctrine is recognized, and the court placed the doctrine upon the same basis on which the cases already cited have put it. This case, like those, is strongly in point.

To these authorities I will add what is said by Mr. Bishop in his *Commentaries on Criminal Law*. In speaking of a party waiving his constitutional rights, he remarks that it is not construed by the court as extending beyond the exact matter concerning which the relief is sought. If, therefore, the verdict which finds a prisoner guilty of a part of the charge against him finds him not guilty of another part, as, for example, guilty on one count of the indictment and not guilty on another count; or, where there is but one count, guilty of manslaughter and not guilty of murder, and a new trial is granted him, he can not be convicted on the second trial of the matter of which he was acquitted on the first. (1 Bishop C. L. § 676.)

In the *State v. Ball*, 27 Mo. 327, this court decided that a conviction of murder in the second degree necessarily acquits of murder in the first degree, and the verdict in the latter case, so long as it stands, unquestionably bars any prosecution for the first named offence. If, in such case, the prosecution would be barred because a party could not be put twice in jeopardy, the bar would not be more effectual if he had been tried and acquitted of murder in the first degree, and there had been no conviction at all of an inferior degree of homicide. But in the former case, it is said, he waives his constitutional right by asking and obtaining a new trial; and he waives it, not I suppose because he intends or desires another trial for the offence of which he was acquitted, but, it is urged, because this must be the necessary effect of it. Of what avail, then, is the constitutional protection, which is thus controlled by a technical notion of the entirety of a verdict, and leaves the accused the alternative of either asking relief from a violation of law only on condition of being



tried a second time for an offence of which he has been declared by a jury of the country guiltless, or of submitting to the consequences of the error, whatever they may be, without redress. If he has the error corrected, he waives his claim to the rights which the law of the land promises him. If he has the error, by which he has been wrongfully convicted, corrected, he is only undoing what has been done in violation of his rights and the law of the land. He is thus necessarily once in jeopardy and convicted by reason of errors against which he protested, and in remedying which he must be subjected to a second trial. But not only so, the second trial, to which he is thus necessitated, if had at all, can only be obtained by submitting to a trial not only on the charge on which he was erroneously convicted, but also upon an offence of which he was found not guilty.

Opposed to the array of concurrent authorities already cited, we have been referred to but two or three cases which recognize a different doctrine. In the case of *Morris v. The State*, 1 Blackf. 37, the defendant was indicted in two counts, the first charging burglary, the second larceny. He was tried and acquitted of the burglary and found guilty of the larceny. A new trial being granted on his motion, there was a similar verdict. This point was disposed of by a single remark, the judge observing, that, independently of the general rule that he who desires a new trial must receive it as to the whole case, it can not be supposed, that, where there are two charges in an indictment, that an acquittal as to one can possibly vitiate the verdict of guilty as to the other. It was objected that the second trial for the burglary was improper, and that, although it was productive of no direct inconvenience to the plaintiff, it may have had an improper influence against him on the charge of larceny. The judgment was reversed, however, on a different ground. In 2 *Leading Criminal Cases*, 502, the authors, in commenting on *Campbell v. The State*, before cited, observe that the direction in the *State v. Morris*, "that he who desires a new trial must receive it as to the whole case," can hardly shake the

reasonable rule laid down in the former, which they remark is well supported by authority as well as principle. The next is the case of the State v. Com'rs Crossroads, 3 Hill S. C. 241, in which it was held that where on an indictment containing two counts the defendants were convicted on but one, on a new trial, ordered at their instance, they may be tried again on both counts. From the decision on this point Judge Gantt dissented, holding that the verdict of guilty on the second count was an acquittal on the first count, and that the new trial ordered at defendant's instance involved the subject matter of the charge in the count on which he was convicted only. In the State v. Stanton, 1 Iredell, —, the question was not before the court and was not necessary to the determination of the case; and the remark of the judge on that point can not be considered as an authority.

Wharton, in his Criminal Law, recognizes a distinction on this point between cases where the indictment contains several counts, on some of which there is an acquittal and on others a conviction, and where there is but one count which includes a greater and less charge; maintaining that, in the latter, if there is a conviction of the inferior degree of offence and a new trial, the new trial will open the whole case, but that such would not be the effect in the former class of cases. The only cases cited by him in support of this distinction is the case of the State v. Morris, before referred to, and a remark of Mr. Justice Grier, in United States v. Harding et al., Wallace, jr. 147. In this case, pending a motion for a new trial, the judge cautions the prisoners, that, if a new trial is awarded, another jury, instead of acquitting them, might find them guilty of the whole indictment, and thus their lives become forfeit to the law.

Our conclusion, then, on this point is that the effect of the first verdict being an acquittal of the appellant of murder in the first degree, he could not legally have been put upon his trial again on that charge upon the reversal of the judgment, and all the instructions given upon the hypothesis of murder in the first degree, of course, were improper.



It is insisted by the appellant that the instruction number five, given by the court at its own instance, is erroneous. The first part of this instruction embraces every hypothesis upon which the jury could base their finding and all the conditions which the theory of the case would seem to imply, and then concludes thus: "Every person is presumed to intend the necessary consequences of his own acts, but such presumption may be rebutted by other evidence." This clause of the instruction assumes that certain consequences necessarily followed the acts of the defendant, and these consequences the law presumes were intended by him. What particular acts were meant does not appear, and on account of the vagueness of the instruction, even if it had been applicable to the case, it was improper as being calculated to mislead. But there was no ground for such an assumption in this case. Unless the acts of the appellant were such as to have necessarily produced results which the law would presume he intended, the instruction was wrong. Could it be affirmed of any act done or declarations made by the appellant that it was necessarily followed by consequences which, as a matter of law, he was presumed to intend? Was the shooting of Watson by Sullivan Phillips, for instance, the necessary consequence of the words addressed by the appellant to another son of Presley Phillips, (who is not charged in the indictment as an aider or abettor,) to "give his father the gun"? Or was the death of Watson the necessary consequence of the presence of the appellant at the time of the commission of the homicide, or of any act done by him on that occasion? Whether Ross was a party to any common design to take the life of Watson, or to do him great bodily harm, or to go through his field, are facts which are to be found by the jury, and which were very properly left to the jury in the first part of the instruction under consideration. The last clause of the instruction was also in the nature of a commentary upon the evidence and was calculated to prejudice.

Another point is that the court below erred in refusing to

give instruction number five [four ?] asked by the appellant. It is well settled that in cases of conspiracy, or other crime perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator in the prosecution of the enterprise is considered the act of all and is evidence against all. Each is deemed to assent to or command what is done by any other in furtherance of the common object. (1 Greenl. Ev. § 233.) After the common enterprise is ended, whether by accomplishment or abandonment is not material, no one is permitted by any subsequent act or declaration of his own to affect the others. The declarations of a conspirator or accomplice are receivable against his fellows only when they are either in themselves acts or accompany and explain acts for which the others are responsible, but not when they are in the nature of narratives, descriptions or subsequent confessions. (Ib.) Instruction number five was intended to embody this principle, and is substantially correct. The court, on its own motion, however, gave an instruction, number fifteen, which presents this point to the jury, though not so clearly as could be desired. In both instructions they are told that they are not to consider the declarations of Presley Phillips to Shelton, Bishop, or any other person, to prove a common design between the appellant and the Phillips; that this must be proved by other evidence; and, upon the hypothesis of such common design being thus established, then these are to be considered in determining the guilt or innocence of the accused. But it is insisted by the appellant's counsel that the 15th instruction is wrong, because it refers to the jury the question of the competency of Presley Phillips' declarations as testified to by Shelton and others; that this was a question for the court, not the jury. If this instruction is liable to that objection, so is the corresponding one, we think, asked by the defendant. But we do not deem the objection to be well taken. It is true, instruction fifteen does not say in so many words that the common design must be established by evidence other than the declarations alluded to, but it does

so, we think, by a necessary inference so obvious that the jury could not have been misled on that point. The jury are told that if they believe from the evidence that there was no common design between Ross and the Phillips, then Ross is not to be affected by any declarations of Presley Phillips. The other instruction tells them the same thing, though in different phraseology.

It is true that a foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact, before the acts and declarations of one of a company of conspirators can be admitted in regard to the common design as affecting his fellows. (1 Greenl. Ev. § 111.) But the rule is not inflexible. Such acts and declarations are sometimes admitted for the sake of convenience before sufficient proof is given of the conspiracy. This rests in the discretion of the judge, but is not to be permitted except under particular and urgent circumstances. (Ib.) The general rule as to the order in which testimony in such cases is to be adduced may be varied from; the judge sometimes permitting evidence to be given the relevancy of which is not apparent at the time when it is offered, but which the prosecutor shows will be rendered so by other evidence which he undertakes to produce. (3 Greenl. § 92.)

One of the grounds assigned for a new trial, and the only one that we deem it necessary to notice, is that one of the jurors who tried the appellant had prejudged the case; that the answers given by him to the usual questions propounded to jurors were untrue, and that those facts were unknown to the appellant until after the verdict in the cause. The affidavits of sundry persons were filed in support of the motion, all agreeing as to the declarations made by the juror previous to the trial respecting the defendant and the Phillips. A counter affidavit of the juror was filed denying the statements of the witnesses, and alleging that at the time he was sworn as a juror he had not formed or expressed an

opinion respecting the guilt or innocence of the defendant, and that he had no bias or prejudice against him. Witnesses were introduced by the State and appellant respectively as to the general character of the juror and the other affiants. The court, in overruling the motion for a new trial, decided that, as to this ground, the statute of this state precluded any inquiry into the alleged prejudgment of the case by the juror after he was sworn, and did not decide on the credibility of the witnesses.

The statute on this subject provides that every juror, grand or petit, shall be a free white citizen of this state, resident in the county, sober and judicious, of good reputation, over twenty-one years of age, and otherwise qualified. (R. C. 1855, p. 910, § 3.) By the eighth section, any person summoned as a grand or petit juror, who is not qualified as required by law, may be challenged and discharged upon such challenge being verified according to law or by his own oath. The ninth section of the same act says that no exception to a juror on account of his citizenship, nonresidence, state or age, or *other legal disability*, shall be allowed after the jury is sworn. Turning to the act concerning practice in criminal cases (R. C. 1855, p. 1190, § 7) it is there provided that there shall be "summoned and returned in every criminal cause a number of *qualified* jurors," &c. Sections fourteen and fifteen of chapter six mention certain causes of challenge, and provide when it may be allowed in particular cases. (R. C. 1855, p. 1191, § 14, 15.)

These are all of the provisions of the statute on this subject that need be noticed. We are of opinion the court erred in its construction of the statute. Taking the several provisions together and construing them as one statute, we are forced to the conclusion that the "legal disabilities" spoken of in the ninth section are such as are contemplated by the third section. This interpretation gives full effect to the terms used in that section, is reasonable and consistent with all the provisions on the subject. The policy of the statute is, doubtless, to promote the fairness and impartiality of the

jury trial; and while the statutory requirements would tend to subserve this purpose, still the absence of certain requisites according to that standard in a juror is not necessarily inconsistent with an impartial trial, and these requisites a party may waive. They are such as he may inform himself of; and when no question is made before the juror is sworn, he is presumed to have waived them. But is he presumed to waive something that in the nature of the case could not be known by the exercise of any sort of diligence? To say that the law on this subject precludes the defendant from objecting, after trial, for a cause that could not have been known before and when the objection is to be taken, is an absurdity. If that is one of the legal disabilities, the law on the subject is a snare. No exception could be taken on this account, because no disability existed, or, which is the same thing for practical purposes, none appeared or could have been discovered. The only test known to human tribunals to test the conscience and mind of the juror was applied, and according to that he was found unexceptionable. What more could have been done? The law was enacted for practical purposes in the administration of justice, and does not require impossibilities; and it is not to receive a construction that would work wrong and injustice, and fetter the accused in the assertion of his constitutional rights to an impartial trial by jury, when it is susceptible of a more reasonable construction.

If the disabilities of the ninth section were intended to include the objection to the juror in this case, it is remarkable that that, which more than any thing else affects the fairness of and impartiality of the trial, should not have been deemed of equal importance at least with that of age, residence and such like, and have been mentioned in the enumeration of the statutory requisites, but instead of which it should be included in the general class of unenumerated qualifications not deemed of sufficient consequence to be referred to other than in the sweeping phrase that concludes that section.



Judge Napton concurring, the judgment will be reversed and the case remanded.

SCOTT, Judge. There is an important question involved in this case, and I will submit my views in relation to it. I do not hold to the opinion, that when the accused has been convicted of murder in the second degree, or any other grade of homicide, on an indictment for murder in the first degree, and a new trial is granted, that such conviction operates as an acquittal of the crime of murder in the first degree, and prevents, on a second trial, the accused from being tried for that offence.

The first difficulty that suggests itself in maintaining that the verdict, notwithstanding the granting of a new trial, operates as an acquittal of the crime of murder in the first degree, is that, if such is the effect of it, then there is no charge on the second trial on which the accused can be tried. Conceding that under an indictment for murder in the first degree, a party may be convicted of murder in the second degree or any other grade of homicide, yet the crime of murder in the first degree includes all those grades, and if the conviction discharges the accused of that offence, what is the charge on which he can be tried? Being acquitted of the greater, which includes all the less offences, how can he be tried for any of them? What is there on which the party can be arraigned? If he can answer the indictment with the plea of a former acquittal, is there any thing remaining on which a judgment against him can be founded? It is no answer to this to say that the accused is only acquitted of the crime of murder in the first degree, and that he may be tried for any less offence included in the indictment. The indictment only consists of one count charging the crime of murder in the first degree, and after the accused is acquitted of that, there is nothing remaining on which a prosecution can be sustained. Greenleaf, speaking of the maxim that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, says that it applies

wherever the first indictment was for a greater offence, and the second is for a less offence, which is included in the greater. Thus, if the first indictment, of which the prisoner was acquitted, was for burglary and larceny, and he be afterwards indicted for larceny only; or if he were indicted of any other compound offence, such as robbery, murder or the like, and acquitted; and afterwards he be indicted of any less offence, which was included in the greater, such as larceny from the person, manslaughter, or the like, he may show the acquittal upon the first indictment in bar of the second, for he might have been convicted of the less offence upon the indictment for the greater. (3 Greenl. Ev. § 36.)

- If this is the law upon separate indictments, it must have much more force when applied to the same indictment. How will the court proceed upon the second trial, if the party to be tried is not guilty of the offence charged in the indictment? By what rule will the right to challenges be regulated? Is he to have a list of the panel forty-eight hours before the trial? Is he charged with murder in the second degree; or with manslaughter in the first, second, third or fourth degree? If he is charged with all of them jointly, is there not a misjoinder? Are not the number of challenges different for these different offences? It can not be said that the same difficulties would arise on the first trial on an indictment for murder in the first degree. There the party is charged with a specific offence, which determines the mode of proceeding. But when it is admitted that the person to be tried is innocent of the offence alleged against him, all that can be said is that he is guilty of some one of the less offences of which he might have been convicted had he been tried for murder in the first degree. If I understand the argument, it is that the verdict on an indictment for murder in the first degree finding the accused guilty of murder in the second degree, although that verdict is set aside and a new trial awarded, yet by the constitutional provision, which declares that no man shall be tried twice for the same offence, the accused stands acquitted of the crime



of murder in the first degree, and must be tried for some inferior grade of homicide. In the case of the State v. Slaughter, 6 Humph. 414, that from which all the cases have come which uphold the opinion that is now combatted, the court attributes to the verdict, finding a party guilty of manslaughter who is tried for murder, the effect of an acquittal for the crime of murder, and that on the ground that a party shall not twice be put in jeopardy for the same offence.

Although it was once controverted, (United States v. Gilbert, 2 Sum. 42,) yet it is now no longer an open question that in criminal cases a court may grant the accused a new trial, although the effect of it is to put him a second time in jeopardy for the same offence. The party then may waive this constitutional right. The constitution requires that the accused shall have a speedy trial by an impartial jury of the vicinage. Under this provision, can he not consent to a continuance when there is no cause for it? If he asks for a continuance as a favor, and it is granted to him without any reason, is he thereby discharged from the prosecution? Can he not waive the right to a trial by a jury of the vicinage, and take a change of venue? Was not this right waived in this very cause? After a jury have been charged with the trial of a prisoner, upon an indictment for a capital offence, they can not, in some cases, be discharged and the prisoner remanded for a second trial but with the consent of the prisoner, when, without such consent, the discharge would have operated as an acquittal. (State v. McGee, 1 Bailey, 651.) Although this case was only an exposition of the maxim of the common law, that no person shall be twice tried for the same offence, yet, Judge Story, in the case of Gilbert, above cited, speaking in relation to it, says: "The constitution of the United States only incorporated into itself a maxim embedded in the very elements of the common law." (*Ex parte Ruthven*, 17 Mo. 541; *Lisle v. The State*, 6 Mo. 426.) In the case of the People v. McKay, 18 John. 212, the court says: "It will be observed, that the judgment is arrested on the motion of the prisoner. An act

done at the request and for the benefit of a prisoner, we are clearly of opinion, can not exonerate him from another trial." (See the opinion of Judge Davis in the case of *United States v. Gilbert*, 2 Sum. 99.) If, then, the accused can waive a constitutional or legal right in a capital case, why should we not hold that, in asking for and accepting a new trial and consenting that a verdict be set aside, that he thereby waives all the benefits of that verdict; that he can not ask that a verdict shall be set aside, and notwithstanding at the same time have its force; that having the power to waive a constitutional privilege and having applied for and obtained a new trial, he shall, like all others, who receive that favor, be deemed to have waived all the advantages of the verdict and to stand precisely as though it had never been rendered? It is admitted that a verdict finding a prisoner guilty of manslaughter, or any other grade of homicide, on an indictment for murder, is, so long as the verdict stands, an acquittal of the crime of murder. But when the verdict is set aside we are left to reason, the nature of things, and the analogies of the law, in order to determine its effects. If one is sued for a thousand dollars and there is a verdict against him for five hundred dollars and a new trial is granted, with what face could he insist, on the second trial, that the first verdict being for five hundred dollars, the plaintiff could not recover against him more than that sum, because by the first verdict it was ascertained that he did not owe more, and therefore there can not be a recovery against him for a greater amount? Is not a plea of former recovery as valid as a plea of former acquittal? Will it be said that in the former case the verdict was set aside and there was no judgment upon it? Do not the same objections arise in the latter case? When the verdict is set aside in the one case, is it not as though it had never been? On what principle can a result be arrived at [different in the one case from that in] the other? Indeed, the argument involves the incongruity of ideas, that a thing may be destroyed and dead and yet retain its vitality.

It can not be maintained that in this case there were two verdicts, one acquitting the prisoner of murder in the first and the other finding him guilty of murder in the second degree. When there is but one crime, one count in an indictment, and one prisoner, there can be but one verdict, however it may be expressed. In such a case a verdict is necessarily an entirety, and must all stand or fall. The case is wide of that in which several are jointly indicted, and one of them is acquitted and the others found guilty, and a new trial is granted them. There, as the common law compelled these men to be jointly indicted and tried, nothing would be more unjust than to make the granting a new trial to those convicted deprive him who was acquitted of the benefit of his verdict and make him undergo another trial. In such cases, although there is formally but one verdict, reason, sense, law and justice say that it must be taken distributively. It is as though there were separate verdicts. The party to a verdict, when he himself is satisfied with it, can not, by the acts and conduct of those with whom he was compelled to unite, be deprived of its benefit. What is this to the case where the party himself is dissatisfied with the verdict, and has it set aside as a favor, which is granted to him, and then would assort out such parts of the verdict as suited him and have them stand, and have other portions of it hurtful to him vacated? Must we construe the voluntary act of the party, by which he waives a privilege, so as to secure to him the benefit of the act and the privilege also which is thereby waived? The verdict being regarded as an acquittal of the crime of murder in the first degree, and as that is the only offence charged in the indictment, though under it the accused may be convicted of an inferior grade of homicide, when he has not been acquitted of it there should be another indictment preferred after such acquittal. If such a course were pursued, what would prevent the party from availing himself of a plea of a former acquittal? Now, is our law fallen into such a state that it can not inform a man of the specific crime with which he is charged

but by insuring his acquittal? Is it to witness a prisoner arraigned on an indictment charging an offence of which he is acquitted, and is that acquittal to be proved by a verdict which has been vacated and set aside? Is it to be involved in all the anomalies and absurdities that will follow from the introduction of this principle, which is opposed to all reason and logic?

The specific question in this case involved is the only one intended to be discussed. Cases are frequently cited in connection with this question which have nothing to do with it, and which steer clear of the difficulty which is presented by this—the absurdity of arraigning a prisoner on an indictment for an offence of which by the record he stands acquitted. The source of this doctrine is the case of *Slaughter v. The State*, 6 Humph. 414, a case in which the point was not involved, in which it is not discussed, and rests on a mere *obiter dictum*; a case to which all the subsequent cases have referred, and seem to rely upon it as authority.

The views that have been expressed here on this subject are not unsupported by authority. In the case of the *United States v. Harding, Wallace, jr.* R. 147, Judges Grier and Kane on the bench, the prisoners were addressed as follows: "You ought clearly to understand and weigh well the position in which you stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offence of manslaughter. Your lives have been in jeopardy and you have escaped. The constitution of your country declares that no person shall be twice put in jeopardy of life or limb for the same offence. This is to shield you against injustice and oppression, and put it out of the power of the court to subject you to another trial, except at your election and request. We believe that you have a right to waive the protection thrown around you by the constitution for the sake of obtaining what may seem to you a greater good; but let me solemnly warn you to consider well the choice you are about to make.

Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment and thus your lives may become forfeit to the law. If you choose to run this risk and again to put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court, and when your solemn election shall have been put upon record, the court will hold you ever after estopped to allege that your constitutional rights have not been awarded to you." Wharton, whose familiarity with the criminal law entitles his opinions to great respect, speaking of the case in Tennessee, above referred to, says the doctrine of it has not been the uniform understanding in practice. The learned editors of the *Leading Criminal Cases* disapprove the doctrine of the case of *Slaughter v. The State*. (*Lea. Cases*, p. 502.) Wharton, in his *Treatise on American Criminal Law*, (p. 983,) says the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions.

As the accused was on a trial for his life, the court should not have used Delphic language in charging the jury. When life is in jeopardy the instructions should be in as plain words as they can be expressed. They should be in reality, what they were designed for, aids to the jury in forming a correct verdict. If the proposition at the close of the sixth [fifth] instruction had been stated abstractedly, it would have been harmless, but taking it in connection with the matter which preceded it, it was injurious to the defendant; injurious from the very fact that its purpose is not disclosed, though it is sufficiently evident that it was prejudicial to the defendant by detracting in some way from the force of what had been previously stated.

This matter of instructions is becoming a source of great difficulty in the administration of our criminal law, where every error may be reviewed. Judges on the circuits are not supposed to be in a situation to write a long discourse on the



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law. Neither the time nor the means are furnished them, and when it is announced that many instructions have been given for the State in a criminal case, it may almost be taken for granted that the judgment will be reversed. In most cases that come here, there is no necessity for instructions on the part of the State, and many plain cases on the evidence are reversed for erroneous instructions, when there was no necessity for them. How pleasing is the propensity in courts to give instructions to counsel for the defence in criminal prosecutions, where they can have every thing reviewed by an appellate court. The singing of the crow did not give the fox half the pleasure.

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COOK'S EXECUTOR, Respondent, v. HOLMES *et al.*, Appellants.

1. The running of the limitation act of March 6, 1835, was suspended by the departure of the debtor from his residence out of the state.
2. Where a promissory note is made to an administrator in his representative character, and such administrator dies, a suit thereon may be properly brought in the name of the executor of such administrator.

*Appeal from Ste. Genevieve Circuit Court.*

This was a suit commenced by attachment by Mason Frissell as executor of Nathaniel Cook, who was the surviving administrator of the estate of Thomas Maddin, deceased. The suit was on a promissory note for eight hundred and ten dollars, executed by defendants in favor of Nathaniel Cook and Richard Maddin, administrators of Thomas Maddin. The note was dated July 10, 1839, and was payable twelve months after date. It appeared in evidence that the defendants left the state of Missouri publicly with their families in the year 1845 and have since resided in the state of Arkansas. It appeared that one of the defendants had visited his former place of residence two or three times, and the other once or twice, and that Cook, plaintiff's testator, had knowledge of their departure and residence abroad. The cause

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was tried by the court sitting as a jury. The defendants asked the court to instruct the jury as follows: "1. The note read in evidence having become due more than ten years before the commencement of the action, and the defendants then being residents of this state and having after that time remained in this state for several years, the right of action of plaintiff's intestate accrued at the time said note became due, and the statute of limitations commenced running against him, and the subsequent removal of defendants from the state, and their remaining absent with the knowledge of plaintiff's intestate that they were absent and where they resided in another state, does not prevent the continuing of the running of the statute of limitations. 2. The plaintiff's right of action having accrued more than ten years before the commencement of this suit is barred by limitation, and the evidence is not sufficient in law to relieve plaintiff from the operation of said statute." The court refused so to instruct. The court found for the plaintiff.

*Noell, Scott & Watkins*, for appellants.

I. The statute seems to apply more especially to those individuals absconding or concealing themselves to evade payment, and not to those who remove from the state years after the indebtedness accrued with *bona fide* intentions. The defendants came back to the county several times, and suit could have been instituted against them without resorting to the extraordinary process of attachment. They slumbered on their rights, and they should be held to abide by the consequences of their neglect. The court erred in refusing the instructions asked. (21 Mo. 22; 22 Mo. 330; 2 Mo. 220; 12 Mo. 239; 13 Mo. 159.)

II. The action is improperly commenced in the name of Frissell, executor of Cook, who was surviving administrator of Maddin. Cook being dead, the action must be prosecuted in the name of the representatives of both of Thomas Maddin's administrators, or the administrator *de bonis non* of Thomas Maddin.



*Frissell*, for respondent.

I. The fact that Cook knew that defendants had removed can in nowise be material. (See *Garth v. Robards*, 20 Mo. 523.) The ordinary process of the law could not reach them.

NAPTON, Judge, delivered the opinion of the court.

This was a suit upon a note and a plea of the statute of limitations. About four or five years after the cause of action accrued, the defendants removed with their families to Arkansas, and have resided there ever since, having made, however, occasional visits to this state in the interim. The question is whether the plea of ten years since the cause of action accrued is, under such circumstances, a bar, and we think it is not.

The statute of 1835, which governs this case, provided that "if, after a cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of the action."

The case of *Nelson v. Beveridge*, 21 Mo. 22, was upon the eighth section of the third article of the statute of 1845, but the reasoning of the court, in that case, in relation to the maxim that where the statute once commences running it never stops, is applicable to this case. It is indeed manifest that this principle has no application to such provisions as are found either in the eighth section referred to in that case or in the section now under consideration. The case of *Thomas v. Black*, 22 Mo. 330, is a construction of the first part of the seventh section of the second article of the act of 1845, and merely decides that the provision has no application where the defendant is not a resident of the state when the cause of action accrues.

The latter part of this section, which is precisely like the provision of the act of 1838, is plain, that the absence of the defendant, after the cause of action accrues, out of the state, occasioned by a change of residence, is not counted in his

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favor, whether the plaintiff is aware of such removal or not. It is not a question of absconding or concealment, as provided for in the eighth section of the third article, but a simple removal to another state, which stops the statutory bar whilst the residence abroad continues. In *Garth v. Robards*, 20 Mo. 522, a mere temporary absence to California, leaving a family and property here, was not considered as within this provision; but in the present case the defendants removed with their families and property, and continued to reside in Arkansas up to the time of the trial.

As the note sued on was given to Cook, administrator of Maddin, upon Cook's death the legal title to the note vested in his executor, and the suit was properly brought in the name of the executor of Cook.

The judgment is affirmed; the other judges concur.

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LA GRANGE AND MONTICELLO PLANK ROAD COMPANY, Plaintiff in Error, v. MAYS, Defendant in Error.

1. A subscriber to the stock of a plank road association, organized under the act of February 27, 1851, (Sess. Acts, 1851, p. 259,) made his subscription upon the faith of an agreement made with a previous subscriber and stockholder that he would not be required to pay his subscription unless the road should be built; *held*, that this agreement was void.

*Error to Lewis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Wagner*, for plaintiff in error.

I. The parol evidence was inadmissible to vary, limit, qualify or release the obligation of Mays. (1 Greenl. Ev. § 275; 1 Pet. 591; 9 Wheat. 587; 8 Mo. 391.) Waltman was not agent for the company. Even if the agreement had been authorized by the company, it would not have been binding. (See 4 Kern. 355.) The agreement was secret between Waltman and Mays, and therefore contrary to public policy

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and void. (18 Pick. 472; 19 Pick. 275.) The work was entered on and money expended, and this was sufficient to fix the defendant's liability even if there had been no act of incorporation. (20 Johns. 89; 1 Pars. on Contr. 378; 12 Mass. 190; 14 Mass. 172; 12 Metc. 565; 18 Mo. 512.)

EWING, Judge, delivered the opinion of the court.

This was an action, commenced before a justice of the peace by the plaintiff in error, to recover an assessment or call on the subscription of the defendant to the stock of the company. There was judgment for plaintiff, from which defendant took an appeal to the circuit court, where the judgment being for defendant plaintiff brings the cause to this court by writ of error.

The plaintiff is a corporation organized under the law of the state authorizing the formation of associations to construct plank roads, approved February 27, 1851. The facts appearing on the trial are, that at the time defendant made his subscription of stock—six shares, or three hundred dollars—one Waltman, one of the corporators, who obtained the subscription from defendant, told him that he would not be required to pay his share of the subscription unless the road should be built, and upon this agreement the subscription was made. It further appeared that afterwards the company was organized in the manner required by law; proceeded to have the route of the road surveyed, expending some sixteen hundred dollars thereon, and made three several calls of two and a half, five and seven per cent. on the stock subscribed to pay for the same; also twenty per cent. damages on the amount of said calls, according to the by-laws of said company; that the road has not been completed, but abandoned. The law under which this company was organized, in regulating the payment of capital stock, provides that the directors may require payment, from subscribers to the capital stock, of the sums subscribed by them, at such times and in such proportions and on such conditions as they shall deem proper, under the penalty of the forfeiture of their stock and of all previous

payments thereon, or under such other penalty or forfeiture as such company may by its by-laws prescribe.

The question presented by the record is, as to the effect of the agreement entered into between defendant and Waltman, another subscriber, annexing the condition already stated to the subscription; whether, the enterprise for which the company was organized having been abandoned without completing the road, the defendant is discharged by virtue of that agreement from the payment of the assessment made upon his stock. This agreement was a private one between the parties, known only to themselves, in which one of the subscribers, without authority from the other subscribers or the company, assumed to permit defendant to limit his liability, and so to qualify it as in a certain event to release him entirely from all obligations as a stockholder. The subscription of the defendant to the articles of association upon its face was unconditional, and he incurred thereby, with the other subscribers thereto, a common liability, and was in all respects upon an equal footing with them. In all such undertakings the respective subscriptions are contributions for a common object, in which each stockholder invests his money upon the faith of a like investment by the others, and especially in the confidence that the engagements and liabilities of each subscriber are what they purport to be. The assurance others held out, of a common participation in the burthens no less than the benefits, is among the chief inducements.

It is evident, from this view of the relation that stockholders sustain to each other, that to give effect to an agreement like that relied on as a defence in this case would be a fraud upon the other subscribers; that it would sanction the principle, that, by a secret stipulation entered into between these parties, they could so modify the contract as to relieve the defendant from a liability which the other subscribers believed he had really assumed, and also of his due share of the burthen which he ostensibly took upon himself by the contract to which he and they in common became parties.

The principle upon which such private agreements are held void is, that the equality, for which the parties to the articles of association therein stipulated, should be preserved, and that the common liabilities which they impose can not be evaded by secret agreements, without perpetrating a fraud upon the others. The fraud in such cases consists in presenting the *ostensible* contract to others as the true contract on the subject, when another secret stipulation existed, which, if permitted to stand as binding, would give full effect to the fraud. It is the secret stipulation alone which operates in fraud of others; and upon that the law leaves the parties where they stand, declining to enforce it for the benefit of either, while, as to the other part of the contract, to enforce it between the parties is what is necessary to defeat the fraudulent purpose as to other innocent persons. (*White Mountain Railroad v. Eastman*, 3 N. H. 141.) In the case cited—the facts of which, being similar to this, may be briefly stated—the action was brought by the railroad company to recover assessments on shares of stock subscribed by defendant's intestate. The defence was that an agreement was made between the intestate and the directors of the company, signed by the clerk thereof, by which, in consideration of defendant's intestate subscribing for thirty shares in said railroad, per request of the corporation, he was to be relieved from twenty-five shares, or such portion of said twenty-five shares as he or his heirs, executors or administrators might, within a specified time, elect to withdraw from his subscription; and that any sum he might have paid on shares that he elected to be relieved from should be allowed him on the shares retained by him in the corporation. The paper signed by the clerk was executed by authority of a vote of the directors, which was not recorded, and when no persons were present except defendant's intestate, the directors, and clerk. It was proved that the subscriptions were so taken in order to show as large a subscription as possible, and to induce other persons to subscribe. Upon this state of facts the agreement was held void as a fraud upon the other subscri-

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bers, and that the original subscription might be enforced for its full amount between the corporation and subscriber. In *Mann v. Cooke*, 2 American Railway Cases, 125, the same principle was applied under somewhat similar circumstances, and the court held that the corporation could not receive a subscription under a private arrangement at less than its par value of the stock, as this would take from the company so much of its available means, and thus operate as a fraud upon creditors and other stockholders.

The other judges concurring, the judgment will be reversed and the cause remanded.



CHRISTIAN UNIVERSITY, Respondent, v. JORDAN, Appellant.

1. If a corporation to which the act to prevent illegal banking (R. C. 1855, p. 286) is applicable violate the same by receiving and passing bank notes of less denomination than five dollars, this violation may be pleaded in bar of any suit instituted by such corporation. (R. C. 1855, p. 288, § 9.)
2. To render a corporation responsible for the acts of its agent, a treasurer, in illegally receiving or passing bank notes of less denomination than five dollars, it is not necessary that the agent should have express authority from the corporation.

*Appeal from Hannibal Court of Common Pleas.*

This was a suit by the "Trustees of the Christian University" to recover certain instalments alleged to be due said University under a contract entered into by defendant, August, 1854. The defendant admitted the execution of the obligation sued upon, but pleaded that the plaintiff, by its officers and agents, had violated the act, approved December 8, 1855, to prevent illegal banking, &c., by passing and receiving, within the limits of this state, bank notes promising or ordering the payment of money, of less denomination than five dollars. The evidence bearing upon the question of the violation of this act is stated below in the opinion of the court. The cause was tried by the court without a jury.



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The defendant asked the court to give the following instructions: "1. If the treasurer of said University received or paid out, within the limits of this state, bank notes, promising or ordering the payment of money, of less denomination than five dollars, before the institution of this suit, the verdict ought to be for defendant. 2. According to the evidence in this cause, the verdict ought to be for defendant. 3. By the pleadings and evidence in this cause, the plaintiff is a corporation of the state of Missouri. 4. If the plaintiff, being a corporation, within this state, has, before the institution of this suit, itself, or by and through its duly constituted and authorized agent or officer, received or paid out, within the limits of this state, bank notes, promising or ordering the payment of money, of less denomination than five dollars, the verdict ought to be for defendant. 5. If Samuel Hatch, as treasurer of the University, paid out, in the discharge of debts due by the institution, bills of a denomination less than five dollars, such payment was, in contemplation of law, a payment by the corporation, although made by said Hatch without any direction upon the part of said corporation as to what kind of money he should receive or pay out." Of these instructions the court gave the third and fourth, and refused the others.

The court found for plaintiff.

*Glover & Richardson*, for appellant.

I. The act of an officer in the scope of his duty is an act of the corporation. The court erred in refusing the instructions asked.

*Dryden & Lipscomb*, for respondent.

I. The statute has no application to the plaintiff. If it does apply, there is not the slightest proof that the plaintiff authorized any of its agents to pay out or receive, within the limits of this state, bank notes, promising or ordering the payment of money, of less denomination than five dollars. The authority of the treasurer was to receive and pay out



money under and in accordance with the law. His authority could be shown by the record of the corporation alone. (Angel & Ames, Corp. § 283.) The authority to violate law can not be presumed.

SCOTT, Judge, delivered the opinion of the court.

This case, in the court below, seems to have turned on the point whether the treasurer of the corporation was authorized by the directors to deal in bank notes of less denomination than five dollars. The treasurer of the University stated that he had been acting as such for some years; that he was the only person authorized by said corporation to receive and pay out money; that as such officer he had frequently paid out and received, within the limits of this state, bank notes, promising or ordering the payment of money, of less denomination than five dollars; that he had never received as treasurer any directions or instructions from said corporation what kind of money he should receive or pay out.

Corporations are subject and entitled to the same presumptions as natural persons. If a resolution or order of the board of directors was necessary in order to make the company liable for receiving or paying out illegal currency, it is obvious that the law against illegal banking could never be enforced against corporations. It is hardly to be supposed that an order to do an illegal act would be spread upon the minutes of the board. If an agent, against the will of the corporation, was to do an illegal act, it would be hard to hold it responsible for it. But if an authorized agent of an incorporated company will for years continue in the violation of law, and he is never checked in it, nor his conduct disapproved by his employers, it would be difficult to find an excuse to exempt the company from the consequences of such conduct. A corporation, by the interposition of an agent, can not place itself in a better situation than a natural person. A money broker in the east may do business here by an agent; he may never come here, nor know in what kind

of currency his agent is dealing. In a suit upon a note to the money broker, would it be any answer, to the defence that the consideration of the note was for the loan of prohibited currency, to allege that the broker had never directed his agent in what kind of currency he should deal? It may seem hard that a corporation should lose its debts by the acts of its agents, when there is no express authority for those acts. But corporations, being ideal, artificial persons, can only act through agents; and, if they violate the law, why should they be in a better situation than natural persons? The agent was in this state and subject to her laws. It was his duty to know and to observe them; if he has failed in this, why should the ideal body be in a better situation than all other persons?

Although the act declares that there shall be a forfeiture of the charter of any corporation for a violation of its provisions, yet we conceive that it is only a forfeiture *pro hac vice*; that is, so far as the particular action in which the defence is set up is concerned. We do not suppose that a total and absolute forfeiture was designed, such as would take place on a judgment against a corporation on a *quo warranto*. Had such a consequence been contemplated, it is of so serious weight that it would have been expressly declared. The purpose of the act is accomplished in permitting the forfeiture to operate only so far as to take away the right of action in the particular cause in which its violation is set up as a defence.

It will be observed that the corporation (the plaintiff in this suit) was incorporated after the provision in the act concerning illegal banking, on which the defence in this action is based, had been incorporated into our code of laws. Hence its charter was taken with the knowledge of the existence of the provision on which this defendant bases his defence. As to the effect of the provision on charters which were granted prior to its enactment, it is not deemed necessary that any opinion should be expressed.

Judge Ewing concurring, the judgment will be reversed and the cause remanded. Judge Napton absent.

BEELER, Appellant, v. CARDWELL *et al.*, Respondents.

1. In an action of forcible entry and detainer, the issue to be submitted to the jury is whether the plaintiff was lawfully, that is, peaceably, in possession of the premises sought to be recovered and the defendant unlawfully entered; the right of entry or of possession are not involved in the issue.

*Appeal from Jefferson Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Pipkin & Thomas*, for appellant.

I. George Beeler could not legally assign the lease so as to give to defendants the possession or the right of possession. A lease does not give possession, but only the right to the possession. An actual entry is necessary. (*Mechan v. Wilcox's Adm'r*, 6 Mo. 436.) A tenant has no power to assign his interest in the leased premises without the written consent of the landlord. (Landlord and Tenant Act, § 11.) The plaintiff having taken the quiet and peaceable possession of the field, it was such a *lawful* possession within the meaning of the act concerning forcible entry and detainer as would make the defendants liable for a forcible entry. (*Krevet v. Meyer*, 24 Mo. 107.) The lease being forfeited by a breach of one of its conditions, the plaintiff was entitled to the immediate possession, and having taken it peaceably and quietly, the defendants could not put him out in any way except those pointed out by law. (27 Mo. 377, 111; 26 Mo. 581, 116; 11 Mo. 354; 1 Hilliard on Real Est. 200.) No notice to quit was necessary.

*A Green*, for respondents.

I. The instruction given by the court is right. George Beeler never gave up the possession to C. S. Beeler, the plaintiff. He was not bound to remain actually on the land all the time in order to keep possession. It was enough that he showed by his acts and declarations an intention to hold possession for the second year. (11 Mo. 354; 4 Bibb, 388;

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27 Mo. 377.) Granting that the agreement of George Beeler with the Cardwells amounted to an assignment of his term, C. S. Beeler could not maintain his action of forcible entry and detainer or re-enter without first giving ten days' notice to quit. (R. C. 1855, p. 1012, § 10, 11; 10 Mo. 601.) The instructions asked by appellant were rightly refused. Dover could not and did not acquire any interest in the lease by buying the corn of George Beeler. Hence he could give none to C. S. Beeler.

EWING, Judge, delivered the opinion of the court.

From the facts proved in this case, it is obvious that a question foreign to the issue involved was submitted to the jury in the instruction given by the court. The jury were instructed that if the plaintiff rented the field in controversy to George Beeler for the term of two years, and that the said George assigned his lease to the defendants, or some of them, without the consent in writing of the plaintiff, then, before the plaintiff can lawfully take possession thereof, he must terminate the lease by giving ten days' notice to quit possession, and the plaintiff having failed to show that he gave notice as above, they will find a verdict for the defendants.

The evidence shows that the land in controversy was leased by appellant for two years to George Beeler and Dow Cardwell, the latter of whom, after the first crop was made, sold his interest to his cotenant Beeler, who sold the crop to Dover. Dover sold the stock field to appellant, the landlord, who took possession and kept his stock therein until about the first of March, and while at the work on the premises was forcibly ejected therefrom by the respondents. It was also proved that the premises in question, sometime during the latter part of the year 1858, were sublet to the respondents, or rather the lease was assigned to them by Beeler, to which it does not appear the landlord assented.

As the case is presented to us by the record, the only question for the consideration of the jury was whether the appel-

lant, plaintiff below, was in peaceable possession of the field and was ousted by force; if so, he was entitled to recover without reference to the question submitted to the jury in the instructions of the court. Whether there was an assignment of the lease or not to respondents was immaterial. That would be important, as well as the question of notice, in an action by the landlord against the assignee of the lease to recover possession upon the ground of an assignment or transfer of the tenant's term or interest without the landlord's assent. (R. C. 1855, p. 1012, § 10, 11.) It is conceded that in such case the landlord could only regain the possession by a peaceable re-entry, or by suit after ten days' notice to the subtenant, or under-tenant, to quit.

In an action of forcible entry and detainer, the right of entry or of possession are questions not involved in the issue to be tried. It is evident that the statute on this subject means to compel restitution of the possession to the party forcibly ousted without any reference whatever to such questions. It declares that no person shall enter upon or into any lands, tenements or other possessions, and detain and hold the same, but when entry is given by law, and then only in a peaceable manner. The sixteenth section of the act, which says that the plaintiff may sustain the issue by proof that he was *lawfully* possessed of the premises, and that the defendant *unlawfully* entered, has received a construction which harmonizes with the tenor of the act, and the only one that would make effective the remedy it gives. (Krevet v. Meyer, 24 Mo. 110.) In that case the word *lawfully* was interpreted to mean nothing more than *peaceably*. The instruction given was erroneous, and the judgment will be reversed and the cause remanded; the other judges concurring.

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Farnsworth v. Terre-Haute, Alton & St. Louis Railroad Co.

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FARNSWORTH, Respondent, v. TERRE-HAUTE, ALTON AND ST.  
LOUIS RAILROAD COMPANY, Appellant.

1. A foreign corporation, which has its chief office or place of business within this state, can not be sued by attachment upon the ground of nonresidence; the liability of such corporations to attachment under the attachment act of 1855 (R. C. 1855, p. 238) is limited to the cases where they have their chief office or place of business out of this state.
2. A foreign corporation having its chief office or place of business in this state may, it seems, be sued, as if resident here, by ordinary writ of summons.

*Appeal from St. Louis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*N. D. & G. P. Strong*, for appellant.

I. The defendant being alleged and proved to be a corporation could not be a nonresident within the meaning of the attachment law, for the reason that the statute has made separate and express provision for the case of corporations, foreign and domestic. There was no proof tendered that the chief office or place of business of the defendant was not within this state. There was no allegation in the affidavit, under the twenty-second section of the act concerning corporations, that the defendant was a foreign corporation having property in this state, nor was there any proof tendered of the existence of such property.

*A. N. Crane*, for respondent.

I. Before the enactment of the twenty-second section of the act concerning corporations, this court had construed the law of attachment affecting nonresident individuals to include foreign corporations. (*Cohen v. Perpetual Ins. Co.* 9 Mo. 421; see *Bushel v. Commonwealth*, 15 S. & R. 176.) The second ground of attachment was not intended to supersede or overthrow this construction. The new clause was only intended to apply to those domestic corporations which go out of the state to do their principal business. "When laws



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speak of things, unless the words show otherwise, they are presumed only to have reference to those things which are within the limits of the territory in which the laws have effect." (Harness v. Green, 20 Mo. 316.) Admitting that it applies to foreign corporations, it should be taken as a cumulative and not as an exclusive ground for attachment. The effect of the construction insisted on by the appellants would be to completely restore the mischief cured by this court in Cohen v. Ins. Co. 9 Mo. 421; for the person of a foreign corporation is not here, the charter being the test of residence. (Marshall v. The Railroad, 16 How. 314.) There is no way of proceeding against the appellant in our courts except by attachment. The second clause of the attachment act does not repeal or limit the twenty-second section of the law of corporations, which specially relates to attachments of *foreign* corporations. A corporation created by one state only can not exist in two states at once. Although metaphysical and intangible, it is not ubiquitous. The corporators can not locate it out of that sovereignty that created it. (13 Pet. 519.) Though all the corporators remove from that sovereignty, the corporation does not follow them. They take their quality of corporators from a law which they can not carry about with them, any more than a judge of this court can carry his judicial functions and authority out of this state. Though all the corporators reside in another state, the corporation can not be sued by summons in that state. (See 2 How. 497; 16 Johns. 5; 14 Conn. 301; 16 Pick. 286.) It will hardly be contended that our legislature has undertaken to give authority to sue foreign corporations by summons. (See 9 Mo. 421; 1 Miles, 78; 16 Pick. 258; 16 Johns. 5; 14 Conn. 303.)

NAPTON, Judge, delivered the opinion of the court.

It must be admitted that the proper construction of our statute concerning attachments as applicable to corporations, taken in connection with the general statute concerning corporations, is not very plain.

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The defendant in this case was a foreign corporation and had its chief office or place of business *within* this state; and the question is, can she be sued by attachment upon an allegation that "the defendant is not a resident of this state."

The attachment law provides that this writ may be sued out, *first*, where the defendant is not a resident of this state; and, *second*, where the defendant is a corporation whose chief office or place of business is *out* of this state. Each of these allegations was made in this case; but as the second was clearly disproved, the first only was relied upon.

The act concerning corporations says: "Any corporation incorporated by any other state or country, and having property in this state, shall be liable to be sued and the property of the same shall be subject to attachment, in the same manner as individuals residents of other states or countries and having property [here] are now liable to be sued and their property subject to be attached." (R. C. 1855, p. 375, § 22.) The terms employed in this section are broad enough to embrace all foreign corporations, whether their chief place of business be within or without this state. If we construe the first clause in the first section of the attachment law to include corporations, it must follow that the second clause is limited entirely to domestic corporations. Otherwise, the second clause is repugnant to the first; for if the mere fact that a corporation is a foreign one is sufficient to bring it within the first clause, then it is of no consequence where the chief office is located, and the section, which makes that circumstance the one upon which the attachment is authorized, must be limited to domestic corporations having their chief place of business without this state.

(The language of this second section, it will be seen, will include both foreign and domestic corporations, and it seems more natural and reasonable so to construe it; for, as the legislature, in the first section, speak of nonresidents generally, and the term itself would not naturally include corporations, and as they proceed in the very next clause to make a special provision for the case of corporations and to point

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out the cases where attachment can be maintained against them, it is unreasonable, by pushing the meaning of the word "nonresident" to its utmost limit, to make it embrace artificial persons fully provided for in a clause immediately ensuing. The provision in the general law concerning corporations (sec. 22) must yield to a special provision in the act which is designed more particularly to regulate attachments. That provision merely declares that foreign corporations shall be liable to ordinary suits, and subject to the extraordinary process of attachment, under the same circumstances in which individuals may be either sued or attached. If there was no other provision on the subject, and the attachment law permitted attachments against persons simply on the ground of nonresidence, corporations could of course be attached on the same ground. But the special provision, in the attachment law, concerning corporations must be understood as limiting the liability of foreign corporations to attachment to cases where they do not have their chief place of business within this state. When the foreign corporation has located here, and has its chief office or place of business here, it seems no longer to be regarded as a foreign corporation. It may be sued as an individual resident here. The president, secretary, &c., are of course here, or such officers as, under our statute, would enable a suit to be brought and service to be had, and there is no necessity for giving the extraordinary process of attachment against it, any more than against a domestic corporation whose chief office is here. Having its chief office here, it ceases to be, for all the purposes of this law, a foreign corporation.)

It is not perceived that any hardship can arise from this construction of the law. It is the law in relation to an individual, who takes up his residence here and becomes amenable to the law of this state and its process. So the foreign corporation takes up its abode here, puts out its advertisement to the public, with the name of its president or other officers, and affords all the facilities for serving the ordinary process of the law upon it, which any corporation with a

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charter derived from the legislature of this state could do. We do not perceive any policy which, under such circumstances, would require any distinction between its forms and modes of liability from that of our own corporations.

The other judges concurring, the judgment is reversed.\*

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McPIKE, Plaintiff in Error, v. KERR'S EXECUTOR, Defendant  
in Error.

1. A. executed in favor of B. the following agreement: "I hereby obligate myself to insure to B. ten per cent. per annum profit upon the amount of capital invested by him in the trade of merchandise to be managed by me at Louisiana, Mo. March 18, 1846. [Signed] A." C. endorsed this agreement as security for A. B. invested money upon the faith of this agreement and endorsement. *Held*, that the liability of A. and C. was contingent and conditioned upon the profits accruing falling below ten per cent. upon the amount invested by B.

*Error to Pike Circuit Court.*

This was an action commenced August 13, 1852, by Abraham McPike, as assignee of James McPike, against William Kerr. Kerr dying, his executor was made defendant. The amended petition is in substance as follows: That on March 18, 1846, one Hyman E. Block, being about to enter into partnership with James McPike, bound himself by an instrument in writing of that date to insure to the said James McPike the payment to him of ten per cent. per annum profit upon the amount of capital invested by him, the said James McPike, in the mercantile business to be managed by him, the said Block, at Louisiana, Mo.; that, at the same time, William Kerr, defendant, in consideration that said James McPike would furnish said Block capital to conduct said mercantile business, and as an inducement therefor, agreed

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\* This case was decided at the March term, 1859, of the supreme court. A motion for a rehearing being filed, it was continued to the October term. The motion was overruled.

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with the said Block and J. McPike that he would become the surety of the said Block for the payment of the annual interest on the amount of capital so invested ; that thereupon defendant endorsed said instrument as security thereto ; that thereupon said J. McPike paid said Block the sum of \$1,200 as so much capital invested in said business, which defendant well knew ; that on January 1, 1850, said J. McPike, for value, assigned said instrument with the obligation therein contained to plaintiff, the said James McPike having, previous to said assignment, paid to the said Block for the said business the sum of about \$2,000 in addition to the sum of \$1,200 above stated ; that Block had the sole management of said mercantile business, and, if he realized a profit of ten per cent. upon the capital invested, has not paid the same or any part thereof to said James McPike, or to this plaintiff ; nor has the said defendant paid the same or any part thereof. Plaintiff asks judgment for \$1,010."

At the trial the instrument mentioned above in the petition, together with the endorsement thereon, was introduced in evidence. They are set forth below in the opinion of the court. James McPike testified that this instrument " was given by him to Block to be executed the day before said Block received the \$1,200, being his amount of capital put into the firm of H. E. Block & Co. He told Block he could not get the \$1,200 until Kerr had executed the paper ; and the understanding of Block and witness was that Kerr was to sign the paper with Block and under his name. The day after Block brought the paper to witness signed as it now is with Kerr's name on it on the back. Witness never had any conversation with Kerr on the subject until a year or more after on his way to St. Louis, when Kerr told him he was bound for ten per cent. interest on the capital (\$1,200) he had put into the concern of H. E. Block & Co." This was all the testimony introduced. The court, at the instance of the defendant, instructed the jury that "no evidence having been given that the defendant was notified of the default and nonpayment of the interest, or that he would be

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held liable on his guaranty, before suit was brought, they must find for defendant."

The plaintiff took a nonsuit, with leave, &c.

*Broadhead*, for plaintiff in error.

I. The contract is not a guaranty but an obligation on the part of Block to pay ten per cent. per annum to McPike upon the amount of capital invested, and Kerr became his security on that obligation. (1 Pars. on Contr. 493; 24 Pick. 250.) The fair construction of the instrument is that Block was to pay ten per cent. to McPike on the capital invested by him, and as much more, if any thing more were made, as the business would yield. The undertaking of Kerr is not a guaranty. It is a direct promise to pay McPike the interest specified in the body of the instrument; nothing collateral about it; no promise to pay if Block does not. McPike would not pay the money unless Kerr would sign the paper. When Kerr did sign, the money was paid. (12 Mass. 154, 297.) The court erred in giving the instruction asked.

*Henderson and Fogg*, for defendant in error.

I. The court did not commit error in giving the instruction asked. The contract was not to pay to McPike absolutely a sum equal to ten per cent. on his capital invested. It was an undertaking to insure or guaranty that the business of the concern would yield a profit of ten per cent. per annum on the capital invested. It was collateral. (2 Parsons on Contr. 144.) The contract of Block was collateral. Kerr's contract was a mere guaranty. No liability can accrue against either Block or Kerr unless the concern shall fail to realize the stated profits, and before that can be ascertained the partnership affairs must be adjusted and settled. The obligation was future in its operation, and the amount to be paid by Kerr, if any thing, uncertain. If the concern realized five per cent. then his liability could not exceed five per cent. In such case the guarantor is entitled to notice of



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the amount to be paid. (1 Pars. on Contr. 501; 22 Maine, 175; 11 Metc. 361; 1 Eng. 142; 13 Conn. 28; 13 Verm. 106; 16 Verm. 63.)

EWING, Judge, delivered the opinion of the court.

The instrument which is the foundation of this suit is as follows: "I hereby obligate myself to insure to James McPike ten per cent. per annum profit upon the amount of capital invested by him in the trade of merchandise to be managed by me at Louisiana, Missouri. March 18, 1846. [Signed] Hyman E. Block." Upon the instrument is this endorsement: "William Kerr; for the annual interest alone." This is an action by the plaintiff, as assignee of James McPike, against Kerr's executor, to recover one thousand and ten dollars, the annual interest claimed to be due on the capital invested by James McPike as a partner of Block in the mercantile business. The question is whether this undertaking of Kerr is in its legal effect a direct and absolute promise to pay the annual interest, or whether it is conditional and the liability it creates contingent. This question will be determined by ascertaining the nature of Block's obligation. The engagement of Block, the principal, was to insure to McPike, his partner, ten per cent. per annum *profit* upon the amount of capital invested by him. By this instrument he intended to secure himself against the ordinary risks of the enterprise to the extent at least of the stipulated profit; but it is evident that he did not intend to *restrict* himself to that sum if the profits of the business exceeded it. If greater than ten per cent., he would be entitled to them; if less, the deficiency is secured by the obligation of Block and Kerr. The language of the instrument, the nature of the transaction, and the relation the parties sustained to each other as partners, make it manifest that Block was to be liable in the event only that the profits of the business should be less than ten per cent. per annum. The terms of the instrument are peculiarly expressive of

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such intention, and are inappropriate to convey a different meaning. Whatever the extent of Block's liability may be beyond the stipulated profit, if any, Kerr's undertaking is expressly restricted to that, and the liability of both is that far commensurate by virtue of the instrument, and may be enforced when it is shown that it has not been realized from the business.

The liability of the surety is generally measured by that of the principal, and will not be construed to be greater unless it is expressly assumed. It is not to be extended by implication. If Block is only contingently liable, Kerr's liability is also contingent, and both, in this respect, stand upon the same ground as to the ten per cent. profit. Kerr's engagement must be interpreted in connection with Block's; and, upon looking at the writing executed by the latter, we understand what is meant by the endorsement. The words "annual interest" there employed evidently mean the per cent. profit which the other side of the paper calls for; and is not an obligation to pay ten per cent. annually on the capital, irrespective of the conditions which, as already observed, its terms clearly import. Thus viewing the undertaking and liability of Kerr, the petition fails to show any cause of action against him. What the profits of the partnership were is nowhere averred in the petition. For aught that appears, they may have been equal to or exceeded the sum stipulated for in the instrument of writing sued on; and, if so, no liability is incurred by the defendant, as Kerr's executor, to pay any thing. If there is a deficiency it must be alleged and proved. The petition being therefore defective, the judgment will be affirmed, without reference to the instruction given by the court, which we think erroneous in maintaining that notice of Block's default was necessary. As we regard the transaction, such notice was not necessary; but, as for the reason stated there could have been no recovery on the petition, the judgment will be affirmed; Judge Napton concurring. Judge Scott absent.

## CARMAN, Appellant, v. JOHNSON, Respondent.

1. The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers.
2. In a case arising under the act of Congress of January 12, 1825, (4 Stat. at Large, p. 80,) where the entry and purchase of land at a land office of the United States is void by reason of a prior sale by the United States, the only relief to which the purchaser is entitled is the repayment of the money paid by him.
3. In no case do the various acts of Congress of March 3, 1819, (3 Stat. at Large, p. 526,) of May 24, 1824, (4 id. p. 31,) of January 12, 1825, (4 id. p. 80,) or of May 24, 1828, (4 id. p. 301,) entitle one entering land at a land office of the United States to a change of the entry and a transfer of the payment made to another tract, except in case such purchaser had made entry of a tract not intended to be entered by reason of a mistake as to the true numbers of the tract intended to be entered.
4. An entry of land in a land office of the United States, made without warrant and authority of law, is a nullity.
5. A patent obtained by fraud will enure to the benefit of the person in fraud of whose rights it is obtained.

*Appeal from Lewis Circuit Court.*

This case was formerly in the supreme court. The decision of the court is reported in 20 Mo. 108. It was an action in the nature of an action of ejectment to recover possession of a tract of forty acres, the south-west quarter of the north-east quarter of section twenty-nine, in township sixty-six, of range seven west. The facts as they appeared in evidence are substantially and briefly as follows: In September, 1846, Carman entered at the land office at Palmyra a tract of forty acres that had been previously entered by S. and W. Hunt. The mistake having been discovered, Carman, on the 26th of May, 1847, relinquished to the United States the tract so mistakenly entered, and made application to be allowed to change the entry and to enter the tract in controversy in lieu of the other. This application and the accompanying affidavits were forwarded by the register to the commissioner of the general land office. While this applica-

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tion was pending, the defendant Johnson made application at the land office at Palmyra to enter the tract in controversy. He did make such entry on the 21st day of June, 1847. The entries upon the books of the receiver and register were afterwards erased by those officers on the ground that the entry by Johnson was conditional and made under an understanding with the register that Johnson was to see Carman, and if the latter insisted upon his right to the tract, then Johnson was to surrender his receiver's receipt and receive back his purchase money. There was much testimony bearing upon the nature of the conversations and understanding had and entered into between Johnson and Davis, the register. Afterwards, on February 4, 1848, Carman—having received a draft for fifty dollars from the treasury department of the United States, which sum was refunded to him for the land entered by him by mistake—entered the land in controversy. He, Carman, on the 19th of April, 1850, received a patent therefor from the United States. There was much evidence introduced, against the objection of plaintiff, consisting of official correspondence of the commissioner of the general land office, of the register and the receiver at the land office at Palmyra. The court admitted in evidence, against the objection of plaintiff, the deposition of Rush, the present register of the land office at Palmyra. In this deposition Rush set forth the usage of the land office in cases of applications for changes of entries. He stated that where such applications were made the land sought to be entered was withheld from sale until the commissioner of the general land office had acted upon the application. He also stated that no application for a change of entry had, so far as he remembered, been granted at the Palmyra office, except in case where the party made a mistake as to the numbers of the tract entered at the time of entering, and shows that he intended to enter the tract to which he asks the change to be made. If the entry was illegal on account of the land having been previously sold, the practice is to refund the purchase money and not to grant a change of entry.

The cause was tried upon an amended answer, in which the defendant set forth the circumstances under which the various entries were made and the patent of plaintiff obtained, and prayed for a decree of title. The court submitted to the jury the following issues: "1st. What have been the value of the rents and profits of the land in controversy since the defendant entered into the possession thereof? 2d. Was the patent issued to the plaintiff by the United States government for the land in controversy obtained by the plaintiff fraudulently? 3d. At the time of the alleged entry by defendant of the tract in controversy, was there an application of the plaintiff pending before the land department at Washington city for a change of a prior entry by him to the tract now in controversy? 4th. Has the defendant made any permanent improvements on said land; if so, what; and what what is their value?"

The plaintiff asked the court to instruct the jury as follows: "1. If the jury shall find from the testimony that Joseph Carman had applied for the land in controversy to the register on the 26th of May, 1847, and that his application was pending at the time of the attempted entry by Johnson, said entry itself was void by law, and the register had no authority to sell to said Johnson. The issuing of the patent to Carman vested the title in him. 2. If the jury shall find that Carman did apply to enter the land in controversy on the 26th of May, 1847, and said application was pending, that no acts of the register or of Joseph Carman after said date would be fraudulent as against Johnson. 3. Before Johnson can set up fraud against Carman, he must show that he had an interest in the land as against the United States, or some right acquired in the entry under the law of the United States; and in that case the acts of Carman or of the register in requiring affidavit from Johnson or notice to Johnson [*sic*]; nor if it should be found that Carman had deceived Johnson or made false representations to him on his erasure of his entry on the books, could be set up in his favor against the patent, unless an interest is shown in

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Johnson. 4. If the jury believe from the evidence that Carman did in fact apply for a change of entry to the land in question on the 26th of May, 1847, and that said application was pending when Johnson applied to enter said land on the 21st of June, 1847, then Johnson acquired no right by his said application to enter an attempted entry, and no representations made either by Carman or Col. Benjamin Davis in relation to said application of Carman, of May 26, 1847, or in relation to Johnson's subsequent application, can be held as fraudulent against Johnson, nor can they affect the title of Carman under the patent, and they should therefore find the second issue for Carman." Of these instructions the court gave the third and refused the others.

The court, at the instance of the defendant, gave the following instructions: "1. An application for a change of entry, in cases where by the laws of the United States no change of entry is authorized and in which no change is granted, amounts in law to no application and is void from the beginning. 2. The laws of the United States do not authorize a change of entry in cases where the United States had no title to the land entered, whether by previous sale or otherwise; but that in such cases the law only authorizes the refunding of the purchase money. 3. If the jury believe from the evidence in the cause that the plaintiff (Carman) purchased by mistake the south-west quarter of the south-west quarter of section twenty, township sixty-six, range seven, which had been previously sold to Silas and William Hunt, and to which the United States had then no title, that in such case the plaintiff could not make a legal application for a change of entry, but could only apply for refunding the purchase money; and if the jury shall so find the facts in this case, they should find the third issue in the negative; that is, that Carman, the plaintiff, had not applied for the land in controversy, unless he made some other application, of which there is no evidence in this case. 4. If the jury shall believe from the evidence in this cause that the plaintiff, or any person for him, sent false statements to the gen-



eral land office, and shall also believe that these false statements induced the department to issue the patent to the plaintiff, then the jury should find the second question submitted to the jury in the affirmative. 5. If the jury shall believe from the evidence that the plaintiff (Carman), or any person for him and at his instance and request, made false statements and representations to the general land office with regard to either his application for the land in controversy or to the purchase thereof by the defendant, and that such false statements induced the department to issue the patent to the plaintiff, then the jury should find that the said patent was fraudently obtained. 6. If the jury shall believe from the evidence in the case that the plaintiff (Carman) entered by mistake forty acres of land which had previously been sold to Silas and William Hunt, and that the plaintiff, on the 26th of May, 1847, made his relinquishment of said entry and applied to change the same to the land in controversy, and shall also believe that instead of granting the change of entry the department at Washington refunded the purchase money to Carman (the plaintiff), then the jury should find the third issue in the negative."

The jury found the issues as follows: "We, the jury, find the following issues: 1st. In the first question we find nothing due for rents and possession. 2d. We find the patent was obtained by fraud. 3d. We find there was no application to Carman for said tract in controversy at the time of Johnson's entry. 4th. The house is worth thirty-five dollars." On this verdict the court decreed the title in defendant.

*Givens, Dryden and Lipscomb*, for appellant.

I. The letters of the register and receiver, the auditor of the treasury, and of the commissioners of the general land office, were irrelevant and calculated to mislead. They should not have been read. The statement of Rush was incompetent. The cause should have been tried by the court without a jury. There is evidence showing conclu-

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sively that plaintiff made his application to enter the land in question on the 26th of May, 1847, twenty-five days before defendant applied; yet plaintiff's first and fourth instructions were refused for the reason, as stated upon their margin, that there was no evidence to predicate them upon. These instructions as well as the second should have been given. (20 Mo. 108.) Defendant's first instruction submits to the jury a question of law. So the other instructions likewise submit questions of law and are also erroneous. The prior application of plaintiff gave him a prior and better right. There is not the slightest proof of fraud. The finding of the jury is unsupported by the evidence, and is not responsive to the questions submitted.

*Bush, Green and Woodyard*, for respondent.

I. The land at the time of defendant's entry was vacant. There was no application by the plaintiff to enter the land, neither was there an application for a change of entry pending at the time of defendant's entry, and the register could not legally refuse to defendant the right to enter the same. Such a refusal would be a fraud upon his rights. The erasure of his entry from the books of the land office was a fraud upon his rights. The plaintiff's patent was obtained by fraud, and he held as trustee for defendant. Plaintiff entered the land with full and actual knowledge of all the facts. Judgment was properly rendered for defendant. (2 Sto. Eq. p. 395, 398; 9 Mo. 323; 7 Mo. 610; 16 Mo. 543.) The finding of this jury was supported by the evidence.

EWING, Judge, delivered the opinion of the court.

As preliminary to the main and most material point in the case, we will notice briefly an objection to certain evidence, documentary and oral, which was admitted on the trial, and which is assigned for error. The documentary evidence consisted of official letters of the commissioner of the general land office and the first auditor of the treasury, showing the action of that department upon the application of the ap-

pellant in 1847—a joint letter of the register and receiver, Mahan and Griffith, of February 1, 1850, in reply to a communication from the commissioner of the general land office in reference to the claim of the respondent to the land in controversy, in which they state that the entry of the appellant appears to be regular, through all the records of their office, with certain exceptions, which are noted, and which consist of erasures upon the books in connection with the respondent's entry; also two letters of Commissioner Butterfield, one of date April 19, 1850, to the register and receiver, in which he announces his decision in the case and that he had caused appellant's certificate of purchase to be relieved from suspension, the other April 19, 1850, to the respondent Johnson, in which he gives his reasons for the decision announced in the previous letter.

We think the evidence was properly admitted. The letters of Messrs. Young and Collins, first referred to, show the action of the department upon Carman's application, and the act of Congress by which they were governed in ordering the money to be refunded to him for the land he had erroneously entered. The other letters are the official correspondence of the commissioner and the officers at Palmyra relating to the contested case of Carman and Johnson, which present their official action in the premises and the grounds upon which that action was predicated. These documents, with others offered and read on the trial, were part of the same transaction, and were admissible as evidence of the official acts of officers, the validity of which was the very question involved.

As to the testimony of Rush relating to the usage of the office, it is sufficient to say that, so far as it was [at] all material or relevant, it was but a statement of what is obvious upon an inspection of the law governing the land officers in such cases, and what must have been the practice of the office if the law had been complied with.

The material point to be considered is whether there was any legal application for the land in controversy pending at

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the time the respondent applied for and entered it in June, 1847; in other words, whether the previous application of Carman, in May of that year, was such as the law recognized, and had the effect to withdraw or suspend the land from sale until the proceeds of the land erroneously entered by him had been refunded by the government, and to give him the right to apply them to the land in dispute.

This question must be determined by the acts of Congress on the subject of correcting erroneous entries of land and of refunding money by the government to purchasers in such cases.

The first act on this subject is that of March 3, 1819, which provides that in every case of a purchaser of public lands at private sale having entered a tract different from that intended; and being desirous of having the error corrected, he shall apply to the register of the land office, and if it appear to the satisfaction of the register and receiver that an error has been made, and that the same was occasioned by original incorrect marks made by the surveyor, or by the obliteration or change of the original marks and numbers, or that it has, in any otherwise, arisen from mistake or error of the surveyor or officers of the land office, the case is to be reported to the secretary of the treasury, with the testimony and the opinion of the land officers thereon; and the secretary of the treasury may direct that the purchaser shall be at liberty to withdraw the entry so erroneously made, and that the moneys which had been paid shall be applied in the purchase of other lands in the same district, or credited in the payment for other lands which shall have been purchased at the same office. (3 U. S. Stat. at Large, 526.) The next act is that of May 24, 1824, which is supplementary to the foregoing, and extends the provisions of the act of 1819 so as to embrace cases where the error was not occasioned by the acts of the officers mentioned in the latter, and to cases of entries, not intended to be made, by a mistake of the true numbers designed to be entered; and it also provides that the purchaser, under certain restrictions as to

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quantity and time, may have the mistake corrected by making affidavit to the facts of the mistake, and that every reasonable precaution and exertion had been used to avoid the error. This evidence, with the opinion of the land officers, being submitted to the commissioner of the general land office, he may, if satisfied of the truth of the facts, change the entry and transfer the payment from the land erroneously entered to that intended to have been entered, if unsold; but if sold, to any other tract liable to entry. (4 U. S. Stat. at Large, 31.) The act of May 24, 1828, is supplementary to the act of 1819, and so extends its provisions as to embrace cases where the lands have been patented. (Ib. 301.) The act of January 12, 1825, is entitled "An act authorizing repayment for land erroneously sold by the United States," and provides that where a purchase is void by reason of a prior sale by the United States, or for want of title thereto in the United States from any other cause, the purchaser shall be entitled to repayment of any sum paid for any such tract of land, on making satisfactory proof to the secretary of the treasury that the same was erroneously sold in the manner aforesaid by the United States, who is authorized and required to repay such sum of money. (4 Stat. at Large, 80.) These are the several laws on the subject of erroneous entries to which we have been referred, and they are believed to be all that have any application to the question under consideration.

Premising that the application of Carman, the appellant, upon which he relies, was made to the register on 26th May, 1847, and the entry of the respondent in June thereafter, the affidavit of Carman, accompanying his application, states that he applied at the land office at Palmyra and entered a tract of land different from that in dispute (which he describes) in September, 1846, and, being since informed that said tract had been previously purchased by the Hunts, he asks to change said entry and locate in lieu thereof the land in controversy. Annexed to this is the affidavit of Griffith, to the effect that he believed the appellant did not know the

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tract had been entered, and that he aimed to enter it in good faith. At the same time, and as a part of his application, the appellant executed a relinquishment to the United States to this land, in which he recites the act of Congress of January 12, 1825, before referred to, as authorizing repayment for the land he had erroneously purchased. These papers are accompanied also by a joint letter of the register and receiver to R. M. Young, commissioner of the general land office, referring to the erroneous purchase by Carman of Hunts' land and to the relinquishment to the government under the act of 1825.

Whether there was any legal or valid application by the appellant for the land in controversy depends upon the fact whether the land erroneously purchased previously was or was not the property of the United States at that time; if not, this fact, irrespective of the mere form of the application or what it may set forth, would seem to be decisive of the question. If his entry was void for this reason, he could only ask to have the money refunded by the government. He could not ask to withdraw the entry and have his money transferred to any other land. The act of 1825 is not supplementary or amendatory of any previous act, but is substantive and independent, and provides for a class of cases not embraced by any other law. The case of the appellant falls within the provisions of that act, because his purchase was void for want of title in the United States. This was the view of the subject taken by Commissioner Young and the officers of the treasury department, as is evident from their action on the application of the appellant in directing his money to be refunded, and in which reference is expressly had to the act of 1825. The money was refunded, and the land not actually entered until the 4th February, 1848.

It is manifest that there is no authority under the act of 1819 for refunding purchase money for land erroneously entered, because, if there was, there would have been no necessity for the act of 1825, which expressly authorizes this to be done. Instead of being refunded under the former act, it



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provides that the purchaser may withdraw the entry erroneously made, and the moneys which had been paid shall be applied in the purchase of other lands in the same district, or credited on other lands previously purchased at the same office. What distinguishes this act from the subsequent ones is that the errors must be such as originate with the surveyor or land officers; and that, if the purchaser wishes the mistake corrected, he may have it done on condition that the purchase money shall be applied to other lands. The distinguishing feature of the act of 1824 is that it provides for errors not occasioned by any act of the surveyor or land officers, and does not therefore embrace this case. Another distinction between this and other acts referred to is, that, upon the correction of the erroneous entry being made, the payment is to be transferred to the tract intended to have been entered, so that, under this act, if an erroneous entry has been made without any agency of the officers, the purchaser, if he wishes it corrected, may have it done by transferring the payment as before stated, but is not entitled to have the money refunded. It is very obvious that there is nothing in any of the acts on the subject that authorizes a change of the entry of one tract to another, unless the party has made a mistake in his numbers at the time of entering, and establishes satisfactorily to the land department that he intended to enter the tract to which he desires the change to be made. The application of the appellant shows nothing of this kind.

In this view of the acts of Congress and of the application of Carman, it follows that the land in controversy was subject to entry on the 21st June, 1847; and the respondent having paid his money and obtained a certificate of purchase, he acquired rights which could not be divested by the acts of the land officers or of the appellant. The application and entry of the latter was a nullity and gave him no legal or equitable right. The land, in contemplation of law, was in the same condition, when the respondent applied for it, as though the appellant had made no application or made no

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attempt to become the purchaser, and the sale to him was unauthorized and improvidently made.

Upon an issue submitted to the jury on the trial of the cause, they found that the appellant had notice of the prior right of the respondent, and that the patent under which he claims title was obtained by fraud. Under such circumstances, the entry of the respondent will prevail over the patent granted to Carman, and is of course unaffected by any acts of the land officers at Palmyra or the commissioner of the general land office, which, as we have seen, were without authority of law.

Judge Scott concurring, the judgment will be affirmed.



STEVENSON, Defendant in Error, v. STEVENSON, Plaintiff in Error.

1. Where the evidence in a divorce case is conflicting, and the decision of the court that tries the cause depends upon the credibility of the witnesses, the supreme court will not interfere.

*Error to St. Louis Court of Common Pleas.*

*Woods & Buckner*, for plaintiff in Error.

*Cline & Jamison*, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The judgment in this case must be affirmed, under the rule of practice acted on by this court in the case of Gillespie v. Gillespie, 28 Mo. 598. The evidence is conflicting, and indeed the decision of the case depends entirely upon the credibility of the witnesses—a matter in which this court must necessarily defer to the opinion of the court which granted the divorce.

Judgment affirmed. The other judges concur.

EATON'S ADMINISTRATOR, Defendant in Error, v. PERRY,  
GARNISHEE, Plaintiff in Error.

1. Drunkenness does not render a deed made under its influence absolutely void, but only voidable; so long as the grantor in the deed acquiesces in it, it can not be impeached by third persons on the ground that it was executed by him when drunk.
2. The first section of the act concerning fraudulent conveyances does not embrace deeds founded upon a valuable consideration.
3. The fact that a mother, intending to preserve the property of a dissolute and spendthrift son for his future support, procures a deed of conveyance thereof to herself, can not of itself, no debts of the son at the date of the execution of the deed appearing, make the deed void.

*Error to Washington Circuit Court.*

This was a garnishment proceeding upon an execution issued against William M. Perry upon a transcript of a judgment rendered by a justice of the peace. Sarah A. Perry, his mother, was summoned as garnishee. The plaintiff filed allegations and interrogatories. In the allegations it is charged that Mrs. Perry purchased the interest of her son in the estate of his uncle John Perry, deceased, for \$1,500, which was less than one-fourth its value; that William M. Perry was drunk and incapable of managing his business; that he was largely indebted at the time of the sale; that said purchase was made by Mrs. Perry with collusion of others to cheat said William and prevent his paying his just debts; that the consideration of \$1,500 was not even paid; that notes were given, which were afterwards cancelled with a view to defraud creditors. The garnishee in her answer denied being indebted to her son William at the time of the garnishment. She admits that she bought her son's interest in his uncle's estate at less than its value, and that she did it for the sake of preserving it for his support. She denied that he was drunk at the time he made the conveyance, and that he was largely indebted at that time; and says that what debts he did owe are paid, and that he owes no debts except such as have been contracted for drink.

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At the trial the plaintiff introduced the deed in evidence, and offered evidence to show that William M. Perry was drunk when the deed was executed; that his brother Samuel had tried ineffectually to get a deed from said William M. Perry; that the value of the interest conveyed was worth four or five thousand dollars. The date of the judgment before the justice of the peace was August 20, 1853; of the execution, March 11, 1856; of the service of garnishment, April 24, 1856. The date of the deed to Mrs. Perry is July 7, 1852.

The court, of its own motion, gave the following instructions: "2. If the jury find that the defendant or her agent took advantage of the drunken condition of William M. Perry, and fraudulently procured him to sell and convey his interest to her at a greatly inadequate price, they will find for the plaintiff the amount of his debt. 3. If the jury find that the conveyance of William M. Perry's interest in his uncle's estate was made to his mother in trust and for the use and benefit of William M. Perry, they will find a verdict for the plaintiff for the amount of his debt and interest thereon from the date of the judgment."

*Frissell*, for plaintiff in error.

*Perryman*, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The second instruction given by the court in this case was, in our judgment, erroneous.

Drunkenness does not render a deed made under its influence absolutely void, but only voidable. A deed, made by a person when drunk to such an extent as would authorize him to repudiate it, may be ratified by the maker when sober so as to bind him and his personal representatives. (Taylor v. Patrick, 1 Bibb, 168; Arnold v. Hickman, 6 Munf. 15.) Judge Colcock remarks, in Williams v. Inabuck, 1 Bailey, 343, "Even if a man is so much intoxicated as not to know what he is doing, he may afterwards confirm the contract by

his acts. If he does not intend to be bound by it, he should go, the instant he is restored to his senses, and return all that he received as a consideration." Besides, the defence of drunkenness, like that of infancy, duress, imbecility, &c., is a personal one, and if the party, whose interest is affected by a contract made when drunk, chooses to abide by it when sober, third persons are not permitted to interpose. (See *Cole v. Gibbons*, 3 P. Wms. 290.)

The drunkenness of William M. Perry, the grantor in the deed sought to be impeached by one of his creditors, had nothing to do with the case so long as William M. Perry himself acquiesces in this deed. There is nothing in the case to show that William M. Perry desires to avoid this deed, and, for aught that appears, he may have ratified it, when sober.

There was no evidence of any actual fraud on the part of the mother, in procuring this deed from her son, other than the circumstance of drunkenness, to which we have alluded. The habitual intemperance of the son, connected with his utter unfitness to manage his own affairs, certainly furnished no grounds for imputing fraud to his mother for simply attempting to place his property, or rather his expected property, beyond the reach of sharpers. That part of the second instruction, therefore, which put to the jury the question of fraudulent designs on the part of Mrs. Perry, appears to be entirely gratuitous.

The third instruction submitted to the jury a question of law—the proper construction of the first section of the act concerning fraudulent conveyances. The court should have explained to the jury what circumstances constituted a conveyance “a trust to the use of the person making it” so as to be within the operation of this section. (*Robinson v. Robards*, 15 Mo. 459.) It will be seen that this section applies only to voluntary conveyances, and does not embrace deeds founded on a valuable consideration. (1 Tuck. Comm. 344.) The deed from William M. Perry to his mother was founded on a valuable consideration; but if it

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was merely voluntary, and there were no debts at the time of its execution, it is not perceived how the circumstance that Mrs. Perry, the grantee, intended to preserve the property for her son's support could of itself make the deed void.

The judgment is reversed and the case remanded. The other judges concur.

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MARSH, Respondent, v. RICHARDS, Appellant.

1. Where a party sues on a special contract to recover compensation due on its performance, he must show performance thereof on his part, or a legal excuse for nonperformance.
2. Where a contractor engages to furnish materials and perform certain work for another—as to construct the brick work of buildings—and he does perform the contract, but not in the manner or with the materials required, he may, notwithstanding, if the party for whom the work is done receive and enjoy the same, recover compensation therefor.
3. The value of the work as actually done proportionally to the price fixed in the contract is the measure of damages in such case.
4. Where a contractor engages to construct buildings with pressed brick fronts, and he uses a brick of inferior quality, the relative cost of pressed brick and the kind of brick used is a proper matter to be considered by the jury in ascertaining the compensation to be allowed the contractor.
5. When two causes of action are joined in a petition, they should be stated separately.

*Appeal from Hannibal Court of Common Pleas.*

The plaintiff in his petition set forth that on the 12th of February, 1857, he entered into a written agreement with the defendant to furnish the materials for and to construct and finish the walls of certain buildings. The stipulations of the contract are set forth, and it is stated that the fronts of the houses were to be built of pressed brick. For the work done plaintiff was to be paid at various rates of \$8, \$8.50, \$9.50 and \$10 per thousand bricks. The work was to be completed by the 1st of September, 1857, and to be paid for as it progressed. Plaintiff then alleges that he duly per-



formed the undertakings made incumbent upon him by said agreement "except in the manner hereafter stated." He then proceeds to set forth the amount of work done under the contract, together with certain items of extra work; also the particulars in which he had failed to comply with the contract. It is admitted that pressed brick were not used as stipulated, and as a justification for not using them it is alleged that defendant consented to modify the agreement in that respect and to allow plaintiff to use "stock" brick. It is also admitted that the stipulated work was not completed at the time agreed upon, September 1, 1857. This failure was charged to be owing to the fault and omission of defendant. The work, it was alleged, was completed about November 1, 1857, and delivered to and accepted by the defendant. The petition then proceeds as follows: "Plaintiff says that defendant owes him, for work and labor done and performed and materials furnished him in the construction of said buildings, the following sums." He then sets the items of work down with their value, being the same items as had previously been set forth in the petition as done under the contract (including the extra work) and charged for at the contract price. He admitted payments amounting to \$1,225, and claimed a balance of \$960.94.

The answer admitted the execution of the contract as alleged. It denied that the amount of brick work done was as great as was stated in the petition; denied the alleged modification of the contract so far as the "pressed brick" were concerned; denied that the failure to complete the work stipulated for at the time agreed upon was owing to the fault or omission of defendant; and set up the noncompliance of plaintiff with the contract by way of counter-claim.

At the trial the plaintiff introduced the contract in evidence, and also evidence showing the amount of the brick work done and the value of the extra work done, and rested. The defendant then asked the court, among other instructions, to give the following: "1. As to so much of plaintiff's demand as relates to materials and brick work done on

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the buildings mentioned in the petition, plaintiff can not recover any thing, because it is admitted by the petition that the brick used were not pressed brick as required by the contract, and because there is no evidence tending to show a modification of the contract as to the kind of brick to be used as charged in the petition. 2. As to the demand for materials and brick work, the plaintiff can not recover any thing, because it is admitted by the petition that the work was not completed at the day appointed in the contract for its completion, and because, further, there is no evidence in the cause tending to show the excuse alleged, or any excuse for plaintiff's default. 3. The jury ought not to find for the plaintiff the price agreed in the written contract read in evidence to be paid by defendant for the materials to be furnished, and the work and labor to be performed by the plaintiff in the erection of the walls in said buildings on Centre and Main streets, because it is admitted by the petition that the materials to be used under said contract in the construction of said walls were not used by the plaintiff in the construction of the walls which he did erect; nor can they find for the plaintiff the reasonable value of the materials furnished and the work and labor performed by the plaintiff in the construction of said front walls, because it is not averred in the petition or proved by the evidence what was or is the reasonable value of the same." The court refused so to instruct. The defendant offered to prove the relative market value in Hannibal, in 1857, of pressed and common and stock brick. The court ruled out the evidence at the instance of plaintiff. Witnesses stated that they could not estimate the difference of market value in Hannibal between a pressed brick front and a stock or common brick front. Evidence was also introduced bearing on the subject of the default of the defendant in obstructing the completion of the brick work at the time stipulated.

The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury find from the evidence that at the time the contract was entered into the cellar walls



were not erected, and that it was understood between the parties that defendant should have the cellar walls put up ready for the brick work, the defendant was bound to have the cellar walls ready for the brick work within a reasonable time after the contract between plaintiff and defendant was entered into; and if the jury further find that the defendant failed to have said cellar walls ready for the brick work within a reasonable time, and that plaintiff was ready and able to have put the brick work within the time specified in the contract, but was prevented from doing so by reason of such failure on defendant's part, then defendant is not entitled to any damages by reason of plaintiff's failure to complete the brick work within the time agreed on. 2. The jury ought to allow plaintiff for the quantity of brick laid in the walls or the buildings according to the prices specified in the contract read in evidence, deducting therefrom the sums of money paid by defendant to plaintiff; and if the balance thus ascertained exceeds the amount of damages allowed defendant upon his counter claim, the jury ought to find a verdict for plaintiff for this excess; and the jury ought to allow to defendant the damages he sustained by plaintiff's act in substituting stock brick in the fronts instead of pressed brick. The measure of such damages is the amount the substitution of stock brick in the place of pressed bricks in the fronts would lessen the value of the building in the market as shown in the evidence."

The court refused the following instruction asked by defendant: "The jury ought to find a verdict for the defendant on his counter claim for the amount of damage it may appear from the evidence he sustained by reason of the failure of the plaintiff to complete his part of the work on said buildings by the first day of September, 1857; and the measure of said damage is the reasonable value of the rents and profits of said buildings during the time it may appear from the evidence the defendant was deprived of the use and enjoyment of said buildings by reason of plaintiff's failure to complete the work contracted by him to be performed by the

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said 1st of September, 1857." The jury found for plaintiff and assessed damages at \$839.46.

*Lamb & Lakenan*, for appellant.

I. This suit was based upon the written contract. No recovery can be had unless a strict compliance with the contract be shown. (4 Mo. 41; 23 Mo. 228.) The petition admits a failure to comply with the contract. There is no proof whatever to show a modification of the contract. The plaintiff having declared upon the special agreement, he can not recover for work and labor done and materials furnished. The court erred in refusing to give the first instruction asked at the close of the testimony of the plaintiff. At that stage plaintiff had shown no cause of action whatever. The court erred in excluding the evidence offered by defendant in relation to the damage he had sustained by reason of the substitution of an inferior kind of brick for the pressed brick. The circuit court required the appellant to show the difference by a market valuation at Hannibal between a building when finished with a pressed brick front and a finished building with a front such as that made by the plaintiff for the building in controversy. The witnesses all agreed that they knew of no such mode of valuation. The court should have received the testimony offered by defendant in regard to the relative valuation of pressed brick and that used, as well as the relative cost to plaintiff of procuring the two kinds of material. (2 Pars. 460; 2 Louis. 45; 7 Hill, 62.) The petition admitted that the building was not finished at the time prescribed. The court should have given the second instruction asked. There was no evidence then before the jury touching the alleged excuse. The jury found against the evidence.

*Porter & Harrison*, for respondent.

I. The court committed no error in refusing the instructions asked at the close of plaintiff's case. Those instructions were based upon the unfounded hypothesis that the petition was predicated solely on the written contract. It

contained a separate statement and claim for work and materials substantially good as a common count. The instructions assumed there was no evidence of the value of the work done and materials furnished. The answer admitted the brick used to be worth \$8.50 per thousand. The evidence offered to show the abstract market value or cost of pressed brick was rightly refused. The principal contract of plaintiff was not to furnish brick, mortar, &c., of a certain description, as upon a sale to him at certain prices, but to do the brick work of certain buildings at stipulated prices and at a stipulated time, with brick of a certain quality or description. The erection of the buildings was the principal subject of the contract; the furnishing of the materials the incident. The work having been done and received, the plaintiff is bound to pay the value of the work done and received, not exceeding the contract price, deducting therefrom what the work was worth less, by reason of any deviations from the contract, either as to the character of the materials used or of the workmanship employed, than the same work would have been worth had no such deviations occurred. (14 Mo. 385; 9 Mo. 218; 23 Mo. 230; 26 Mo. 102; 7 Pick. 184; Sedgw. on Dam. p. 220.) Plaintiff failed to prove the damage done by reason of the deviation of plaintiff from the specifications of the contract, viz., that the building was worth less, or how much less it was worth, by reason of the substitution of a different kind of brick. It is the value of the work when done, and not of the materials, that must be the test of damage.

SCOTT, Judge, delivered the opinion of the court.

There is no doubt that when a plaintiff sues on a special contract to recover the compensation due on its performance, that he must show that the contract has been performed or a legal excuse for its nonperformance. But it is not necessary always to sue on the special contract. After a contract has been performed, the money due the contractor may be recovered on the common counts unless the contract contains some special stipulation or condition requiring an averment of



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performance. The present practice act has not done away with the common counts, though now, when resorted to, they must contain a plain and concise statement of the facts constituting the cause of action. (Howard's Practice, 195.) Although it is generally true that a party must perform his contract before he can be entitled to the compensation due on its performance, unless it is otherwise stipulated, yet there are cases in which the services rendered by the contractor are valuable to him for whom they were performed, and he has expressly or tacitly accepted them. In such cases, although the work has not been done within the stipulated time nor in the manner or with the materials required by the terms of the contract, he who performed the work may recover what it is reasonably worth to the owner, not exceeding the contract price. When work is to be performed with a specified material, or in a particular manner, for a price agreed upon, and which is favorable to him who has the work performed, the contractor can not, by violating his contract, place himself in a better situation than if he had complied with his undertaking. The terms on which it was proposed to do the work may have been the inducement to the contract, and to permit the contractor to violate his contract and to recover the full value of his labor and materials would be encouraging dishonesty and unfair dealing. In such cases, the measure of damages would seem to be justly arrived at by the statement, that if the work, when done under the contract and in pursuance to its terms, is worth the price agreed upon, what is the work worth, done as it is, proportionally to the price fixed by the contract? In this way, he who has contracted for the work will retain the advantage he had a right to secure to himself in fixing the price of the work, and of which the contractor can not deprive him by his own act in violating his undertaking. This, of course, goes on the ground that the party insists on his contract, and has not consented to its abandonment by the contractor. When he, who has contracted to have work done, is in a situation to see and to know that the work is not be-



ing done in pursuance to the terms of the contract, it will always be prudent to object at once, as otherwise the jury may draw such inferences as to its abandonment from his failure to do so as all the circumstances may warrant. Fair dealing and a desire to avoid litigation would seem to require this much. When a contract is by consent abandoned, there will be no hardship in allowing the contractor to recover the value of his materials and labor on a *quantum meruit*.

We do not conceive that the petition in this case is founded on the special contract. It is very informal, but it must be regarded as a complaint for the nonpayment of the sum which the plaintiff's services and materials were worth. The petition contains two causes of action stated in a way contrary to the terms of the statute. When two causes of action are joined in a petition, they should be stated separately, and each cause should stand by itself, and there should be some words showing that another cause of action was about to be stated. This petition begins with the statement of one cause of action, and in the middle of it sets out another, and afterwards resumes the statement of the cause first begun to be set out. Such a course must inevitably produce confusion; and it is strange that parties, who conceive that they have a good cause of action, should not endeavor to set it out in a plain, simple way, so as to be easily comprehended. If he wishes to join in the same petition two causes of action, after one cause is fully stated, he should begin the second statement, and every subsequent one, with the words "and for another cause of action," &c., or some such words as will clearly set forth his intention. Plaintiff can not and ought not to expect any advantage by jumbling several causes of action together in such way as gives rise to a contention whether one or more causes are united in the petition, and as to the relief to which he is entitled. So the statute requires that the several defences should be stated separately, just as several pleas were formerly pleaded in suits at law.

We are of opinion that the court erred in excluding evidence of the value of pressed brick and in giving the instruc-

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tion in relation to that subject. In excluding evidence of the value of pressed brick, the court took from the jury the principal element which would be regarded in ascertaining the amount of injury sustained by the defendant in consequence of the violation of the contract by the plaintiff. That evidence might not be conclusive, nor would it be the only matter weighed by the jury in forming their verdict, but certainly it was a subject for their consideration, and no reason is seen why it should be excluded. Not satisfied with this, the party would have the court establish a measure for the ascertainment of the defendant's damages which was utterly impracticable, and which was pronounced to be so by all of the witnesses examined on the subject. The standard proposed was such that nothing was known about it. Indeed it is not easily understood what is meant by the "market value" of houses. The plaintiff's undertaking to build the front walls with pressed bricks at a low price may have been the inducement to the defendant to enter into the contract. The jury should have been instructed, that, in fixing the damages sustained by the defendant, they should take into consideration the price of the work as declared by the contract, and then determine, if the work when done in pursuance to the contract is worth that sum, what it is worth done as it is. A contractor, who has undertaken to build a house with a costly material, will not be permitted to use an inferior one, and then say that the difference is a matter of taste, and that the one house is as valuable as the other. If one pays for the gratification of his taste, he has a right to have it gratified. But this is not matter of taste, as pressed bricks are worth more than ordinary ones in a building. (*Farmer v. Francis*, 12 Ired. 283.)

Judge Ewing concurring, the judgment is reversed and the cause remanded. Judge Napton absent.

PARKS, Appellant, v. WATSON *et al.*, Respondents.

1. A., being the owner of two sections of land, by instrument dated in 1836 and recorded in 1837, sold and agreed to convey to B. an undivided one-fourth part thereof. The interest thus acquired passed to and became vested in C. by deed dated April 29, 1842, but not recorded until December 20, 1847. A., by deed dated in 1839 and recorded in 1841, conveyed said two sections to D. and E. subject to the rights of B.'s representatives under the above agreement. Under this deed to D. and E., C. became interested to the extent of an undivided fourth part of the interest thus acquired by said D. and E. In 1844, under an execution issued against C., the sheriff levied upon "all the right, title, interest and estate of the said C. in and to" the several tracts embraced in the deed from A. to D. and E., together with other tracts. In the levy and advertisement the tracts described in the deed from A. to D. and E. are designated by the numbers of the sections, township and range, after which there follows this further description: "Being the same property conveyed by A. to D. and E. by deed dated 28th of June, 1839, and recorded in book O, p. 351 and 352." The deed of the sheriff adopts the descriptions contained in the levy and advertisement, and conveys to the purchaser "all the right, title, interest and claim" of C. in and to said tracts so described. *Held*, that the purchaser, by this sheriff's deed, acquired title to that interest only which was vested in C. under the deed from A. to D. and E., and not to that held by him, at the date of the levy and sale, under the title acquired by B. from A.

*Appeal from St. Charles Circuit Court.*

This was a suit in the nature of a bill in equity. All parties claim title to the land in controversy under Jamison Samuel, who entered, and obtained patents for, sections twenty-seven and twenty-eight, in township forty-eight, of range five east. Samuel, by an instrument dated January 11, 1836, and recorded June 6, 1837, "bargained and sold unto George Shannon, of, &c., one undivided fourth part of" said sections twenty-seven and twenty-eight. Said instrument, after more particularly describing said sections, proceeds as follows: "And the two sections constitute one body of land, one-fourth part of which I hereby promise and bind myself to convey by deed in fee simple to the said George Shannon, to be selected on any of the outer lines, the whole fourth to be in one body and in due proportion to the figure

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of the whole plat of the whole body of land hereby entered. And I promise to make said conveyance whenever I receive patents for the same, or sooner, if said Shannon requires it. In witness whereof," &c. Shannon mortgaged the interest thus acquired to one Ayres, January 29, 1836. This mortgage was foreclosed, and at the sheriff's sale under the decree of the court Ayres became the purchaser. The sheriff's deed to him was acknowledged May 17, 1839, and recorded August 29, 1840. Ayres conveyed said interest to Elias T. Langham by deed dated April 29, 1842. This deed was recorded December 20, 1847. Langham, by deed dated August 4, 1848, and recorded the same day, conveyed the same to his daughter Wenona Langham. This was a voluntary conveyance. In March, 1856, the said Wenona and her husband conveyed said one-fourth interest to the plaintiff Robert H. Parks. The title thus acquired is that asserted in this suit.

Said Jamison Samuel, by deed dated June 28, 1839, and recorded June 21, 1841, conveyed to Angus W. McDonald and Kennedy Owens, among other tracts, the following: "Sections numbers twenty-seven and twenty-eight, in township forty-eight, of range five east, containing each six hundred and forty acres; these two sections to be subject nevertheless to the rights in law derived or derivable to the legal representatives of the late Judge Shannon under a certain instrument of writing executed by the said Jamison Samuel unto the said Judge George Shannon, deceased, in his lifetime." By instrument in writing, dated July 8, 1841, but not recorded, and executed by A. W. McDonald and Elias T. Langham, it was acknowledged and declared that said Langham was interested in said purchase equally with McDonald, and that his name ought to have been inserted as grantee in the deed from Samuel. On the 25th of April, 1843, McDonald recovered a judgment against Langham in the St. Louis court of common pleas. An execution was issued on this judgment to the sheriff of St. Charles county. Under this execution the sheriff levied upon "all the right,

title, interest, and estate of the said Elias T. Langham in and to" certain tracts of land, a portion of which are described in the sheriff's advertisement as follows: "1st, one section of land (No. 27) twenty-seven, in township number forty-eight (48), range five east, containing six hundred and forty acres; 2d, one section of land, number twenty-eight (No. 28), in township number forty-eight (48), range five east, containing six hundred and forty acres; [the advertisement proceeds to enumerate three other tracts;] being the same property conveyed by Jamison Samuel and wife to Angus W. McDonald and Kennedy Owens by deed dated 28th of June, A. D. 1839, and recorded in the recorder's office of St. Charles county, in book O, page 351 and 352." The sheriff's deed, which was acknowledged May 14, 1844, and recorded September 14, 1848, conveyed "all the right, title, interest and claim which the said Elias T. Langham had in and to said several tracts of land" to Angus W. McDonald, adopting the description contained in the advertisement. The defendant Watson claimed title by virtue of various conveyances from McDonald and Owens.

The plaintiff prayed that the court would "decree a fee simple title in the petitioner in and to the one-fourth part of said two sections of land, and have the same set off to him on one of the outer lines of the said two sections of land in one body, according to the aforesaid agreement of the said Jamison Samuel and George Shannon; and that the west half of section twenty-eight above described be set off and allotted to him, the said half section being one-fourth of the said two sections of land, and being in one body, and on one of the outer lines of said two sections of land, and in due proportion to the figure of the whole body of said two sections of land, and for such other and further relief," &c.

The plaintiff asked the court to "decide that no title to the land in controversy passed to Angus W. McDonald by virtue of the sheriff's deed of May 13, 1844, except such title as was conveyed to McDonald and Owens by the deed of Jamison Samuel of June 28, 1839." The court refused

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so to "decide, but decided that said sheriff's deed conveyed to McDonald all the title to said land that said Langham had at the date of the levy of execution on said land, and at the time that the execution came to the hands of the sheriff of St. Charles, derived from any source whatever."

*Leonard, Wells and E. A. Lewis*, for appellant.

I. The words, in the sheriff's deed to McDonald, "being the same property conveyed by," &c., are restrictive of the general description before given. (5 Metc. 25; 6 Metc. 532; 5 N. H. 536; 7 N. H. 244; 5 N. H. 59; Greenl. Ev. § 286; 2 Phill. Ev. 718, 734; Clamorgan v. Lane, 9 Mo. 475; Broom's Legal Max. 273; 6 Conn. 722; Flagg v. Bean, 5 Foster, 49; 1 Dev. 242; 14 Penn. State, 29; 11 Barb. 174; 4 Mass. 205; 4 Foster, 54; 13 Maine, 430; 37 Maine, 63.)

*Glover & Richardson and Broadhead*, for respondents.

I. The court rightly refused the instructions asked. The legal effect of the sheriff's deed was to pass all Langham's interest in sections twenty-seven and twenty-eight. (5 Metc. 28; 4 Mass. 196; 2 Metc. 41; 6 Metc. 529; 36 Maine, 316; 31 Penn. State, 475; 2 Parsons on Contr. 59.)

NAPTON, Judge, delivered the opinion of the court.

The sheriff's deed, which we are called upon to interpret in this case, in pursuance of the words of the levy, advertisement and sale, conveyed "all the right, title and estate" of Langham in "sections twenty-seven and twenty-eight" (township and range being specified) and in several other pieces of land, all of them, including these sections, being enumerated in the deed from Samuel to Owens and McDonald, and proceeds with this further description: "Being the same property conveyed by Jamison Samuel and wife to Angus McDonald and Kennedy Owens, by deed dated 28th June, 1839, and recorded in recorder's office of St. Charles county, in book O, p. 351 and 352."

The deed from Samuel to McDonald and Owens, thus referred to, does not convey the entire sections twenty-seven



and twenty-eight, but only three quarters of them, excluding from its operation an undivided fourth of the two sections previously conveyed by the grantor to George Shannon. It appeared from another instrument of writing also on the record, that Langham was equally interested with McDonald in this purchase made from Samuel, and that it was through inadvertence or mistake that his name was omitted in the deed. These deeds showed that at the date of the sheriff's sale, heretofore adverted to, Langham had one-fourth of three-fourths of the two sections, deriving his title from the conveyance of Samuel to McDonald and Owens, referred to in the sheriff's deed.

Previously to the sale from Samuel, the original proprietor, to McDonald and Owens, as appears from the recitals in the deed to these persons, as well as by the instrument of writing itself by which it was effected, Samuel had conveyed to George Shannon a fourth part of these two sections, which "was to be selected on one of the outer lines of the entire tract, and was to be in one body and in due proportion to the figure of the whole body of the said land." This title, by conveyances and mortgages, had been, at the date of the sheriff's levy, *entirely vested in Langham*.

Langham was then, at the date of this sheriff's sale, the owner of *one-fourth* of these sections by a title derived from the deed of Samuel (the original proprietor) to Shannon, and of the fourth of the other three-fourths by conveyances based upon the deed from Samuel to McDonald and Owens.

The question in this case is whether the sheriff's deed conveyed both these interests, or only the interest which he held under a derivative title, based upon the deed to McDonald and Owens, particularly referred to in the sheriff's deed.

There is something on the face of the sheriff's deed as well as his levy and advertisement, which seems to convey the idea that Langham was not the owner of the entire sections twenty-seven and twenty-eight. No one, we think, could read the sheriff's advertisement and take up such an impression from its phraseology. It seems to be implied, by

the use of the words "all his right, title and interest," as well as by the diffuse or extended description which follows, that he was not and did not pretend to be the owner of the entire tract of land indicated by sections twenty-seven and twenty-eight. It is clear that the sheriff did not so regard him, for, if he did, it is impossible to account for the unnecessary circumlocution employed by the sheriff to describe a thing at once so simple, plain and easy to be expressed.

This being the general impression conveyed by the sheriff's description, the question would naturally arise with those who proposed to bid or to buy, what is the interest which Langham has in these two sections, and which it is proposed by this advertisement to sell? The answer to that by the sheriff is, "being the same property conveyed by Jamison Samuel and wife to Angus McDonald and Kennedy Owens, by deed dated," &c. This deed shows that only three-fourths of the two sections were conveyed by it, and if Langham's title was based upon it, his interest could not exceed that proportion of the whole tract. This deed, it is true, does not use Langham's name, nor was it material that it should, for a reference to the public records, just as accessible as this deed, to which purchasers were referred, would show that Langham had one-half of McDonald's interest. The mere reference to the deed by the sheriff would be sufficient to advise any one that Langham's interest had its source in that title; for, if it had no connection with it, such a reference to it would be a mere absurdity, unless we adopt the suggestion that it was designed to be a more perfect description of sections twenty-seven and twenty-eight. This last suggestion is not entitled to much weight, and involves the extremely improbable supposition that the officer supposed he could, by any amount of circumlocution, make a description of a section of public land clearer than a simple enunciation of its number would make it. But the deed is evidently referred to for no such purpose, but to show the quantity of title he was selling and its origin.

In interpreting written instruments of every kind, courts

must resort and invariably have resorted to extrinsic circumstances. The situation and surroundings of the person whose deed or will is under examination, and of the subject matter affected by the paper, will necessarily enter into the consideration of a court in determining the intent of the instrument. We must place ourselves in the condition of the person writing to understand what he means and intends. Hence cases upon the construction of written instruments can not go far as precedents, and do not usually throw much light upon other cases. A very minute circumstance or expression will change the whole force of a paper, and each case, after all, is settled by its own circumstances.

In reaching the conclusion, however, which we have done in this case, we do not consider that it is unsupported by authority. On the contrary, we think the weight of authority sustains us, and we are not prepared to admit that any of the decided cases necessarily conflict with the view we have taken of the case. Some of the cases appear to conflict, probably do conflict, but most of them are reconcilable, and the apparent diversity grows out of really different circumstances, and a resort to different rules of interpretation. Sometimes the general intent of an instrument is quite apparent, and courts, in such cases, disregard details conflicting with such general intent; sometimes one rule of interpretation is chiefly relied on, properly so in the case, whilst in another, with equal propriety, another maxim is resorted to for the purpose of elucidating the intent.

It is not proposed to review the authorities in detail; but we refer to a few of them to illustrate our views.

The case of *Sheppard v. Simpson*, 1 Dev. 242, is very much like this case in all its particulars. There the sheriff's deed conveyed "*all the interest*" which the defendant in the execution had to a certain tract of land, describing it, and then the language of the deed is: "Being the land devised to C. S. by his father D. S., and the undivided share of the said C. S. in the lands of his deceased brother J. S." This deed was held to pass only the interest derived by C. S. from

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his father and his brother, although, at the date of the levy, advertisement and sale, the defendant in the execution owned the entire tract of land described by the will of his mother. The case is not distinguishable from the present, and some observations made by the judge who delivered the opinion of the court in that case may be transcribed as applicable to the present. "It is of great importance," said Judge Taylor, "to the public, that the land sold at a sheriff's sale should be so specified and defined that every person attending may know what price to bid, and to be under no doubt as to the land he is bidding for. If the whole of C.'s land passed under this deed, it would give an undue advantage to those bidders who were apprised of the true state of the title, and enable them to purchase the whole tract, while others were regulating their bids by the belief that nothing more than the land described by the sheriff was set up for sale."

The cases of *Barnard v. Martin*, 5 N. H. 534, and *Allen v. Allen*, 14 Maine, 387, are cases of voluntary conveyances, where general terms of description—as the word homestead, house, farm, &c.—are restricted by subsequent special boundaries. They are in accordance with the cases quoted from North Carolina.

The case of *Northington v. Hillyer*, 4 Mass. 205, is decided upon its own peculiar circumstances. It was a case in which the general intent of the grantor was most manifest, and the court would not permit an additional particular description, calculated to throw obscurity over the entire deed, to defeat the main purpose of the parties to it; and it was therefore rejected as false description. That was not a sale by an officer under judicial process; and, if it had been, it is not clear that the court would have come to the same conclusion. (*Mason v. White*, 11 Barb. 174.)

The cases of *Wheeler, adm'r, v. Randall*, 6 Metc. 532; *Thatcher v. Howland*, 2 Metc. 41; *Elliott v. Thatcher* (reported in a note to this last case), and *Melvin v. Prop. Locks, &c.*, 5 Metc. 15, are cases in which the general intent of the deed to convey all the property first described is thought to

be so plain as to authorize and require the courts to disregard subsequent clauses apparently restricting the operation of the deeds. They are all based upon the maxim, *falsa demonstratio non nocet*. The case of Elliott v. Thatcher, like that of Northington v. Hillyer, is a case of plain mistake in the additional descriptive words used; and to give them their full force or make them restrictive would be against the plain general intent of the deed. These cases are entirely reconcilable with the decisions in North Carolina and New Hampshire, although the case of Melvin v. Prop. Locks, &c., 5 Metc. 15, may not be, and was at all events not so thought to be by the judges who decided it.

We proceed, in this case, upon a cardinal rule of interpretation, that effect is to be given to all the words of a written instrument. If the words are restrictive, then the grant will be restrained within the limits of the restrictive clause, if by so doing we can make it available. If the restrictive terms have nothing to operate on, they must be rejected as insensible. (Shepherd's Touch. 247.) We may believe, from the circumstances of the case, that if the sheriff had known of Langham's interest under Shannon he would undoubtedly have sold it, as well as that based upon the title under McDonald and Owens; but the question is, did the sheriff so intend, and did the bidder so understand it? Looking at the advertisement, what may we suppose the purchaser to have been buying? Langham's interest in sections twenty-seven and twenty-eight, undoubtedly; but what that interest was would be the next inquiry by the bidder, and the answer to that is to be found, as we think, in the reference made by the officer to the deed from Samuel to McDonald and Owens. This clause is not, as we understand it, cumulative, but restrictive, and can not be rejected as mere *falsa demonstratio*.

Judge Ewing concurring, judgment reversed and cause remanded. Judge Scott absent.

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McCune v. McCune.

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## McCUNE, Respondent, v. McCUNE, Appellant.

1. When a person parts with his property, he may attach such lawful conditions to the transfer as he thinks proper.
2. Slaves were devised by a husband to his widow for life, with remainder to their children at her death. The persons appointed by the will to make the division among the heirs, with the consent of the widow made a division of the slaves among the heirs and widow, she reserving the right to take back the slaves at any time she should choose to do so. This condition was not communicated to the heirs. *Held*, that the acts and declarations of the heirs were inadmissible in evidence against the widow to show that she had consented to an unconditional surrender of the slaves allotted and an abandonment of her life estate, unless it were shown that she had knowledge of, or assented to, or acquiesced in, such acts and declarations, in some form or other.

*Appeal from Ralls Circuit Court.*

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

*Henderson*, for appellant.

I. The mode of appraising the slaves, the valuation at their full worth, the payment of money between the heirs to make their slaves equal, the agreement of the heirs to support an aged slave whose support devolved on the plaintiff in consideration of the division, the fact that notes previously given by the heirs to the executor were adjusted in this transaction, their rights made equal in every thing to that date, and all obligation over to the estate cancelled at the time, with the knowledge and consent of plaintiff, and that one of the parties receiving slaves on that day and under the same distribution and division was permitted to take them to California without objection on her part, and under the belief of the other heirs that the division was final, conclusive and operative on all the parties, are facts throwing light upon the transaction, and the court should not have excluded them. J. S. McCune's letter should have been admitted. The instructions asked and overruled should have been given. The



instruction given for plaintiff was erroneous, in that it declared it was unnecessary to communicate the conditions of the possession to the defendant.

*Broadhead*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action by the widow of Samuel McCune, deceased, to recover the possession of three slaves, which, with all the other property of the testator, were given by his will to respondent during her life or widowhood, with power to dispose of all or any of the slaves should they become disobedient; and at her death said property was to be divided among the three children, Henry, Joseph and Rebecca. William L. McCune, John S. McCune and Thomas Cleaver were appointed by the will to make division of the property. In 1852 and after testator's death, the three last named persons met at the house of respondent and made division of a portion of the slaves among the heirs. The slaves in controversy were assigned to appellant and his wife Rebecca, and he took possession of them.

The respondent insists that the slaves were merely loaned to appellant, and that the right was expressly reserved to take them back at any time. The appellant alleges that the partition was intended as a surrender and abandonment of her life estate, and that no conditions were annexed. On the trial respondent read the will, introduced some evidence as to the value of the slaves and their services, and closed. Appellant then proved the division of the slaves, as already stated, at the house of the respondent; that it was made as equal as possible among the heirs; and that those allotted to appellant shortly thereafter went into his possession, three or four being assigned at the same time to the respondent. It was also proved by John S. McCune, the executor of the will, that the division was made at his instance; that, being desirous of getting the estate off his hands, the legatees being of age, he proposed to respondent that she should reserve

such of the slaves as she wished, and consent to a division of the remainder among the heirs; that she at first objected, saying that it was the request of the testator that the negroes be kept together during her life, and that she had promised him to do so, but finally consented, reserving the right to take them back at any time she chose to do so; that among the slaves selected by the widow was an old woman, and upon witness advising her to take a younger one, she declined, saying she could take any of them back whenever she desired. After this the division was made as stated; the witness took receipts as executor from the parties for the negroes. The heirs were not informed by him of any conditions, nor of the conversation he had with the respondent. He declined communicating the conditions to appellant and the other heirs in order to avoid unpleasant feelings on their part towards the respondent and to have the business of the estate settled. Appellant then offered to prove that in the valuation of the slaves they were valued regardless of the widow's life estate; that in the distribution an old and decrepit slave in respondent's possession, and a part of the property bequeathed to her by her late husband, was to be taken care of and supported by the three legatees; also that the heirs paid money to each other at the time to make the shares equal; and that one of the legatees had since removed to California taking the slaves allotted to him with the knowledge of the respondent. He further offered to prove that all the property received by the legatee, Rebecca, in the lifetime of her first husband Wright was turned over to the witness (Cleaver) for the benefit of the two children of said Wright. The rejection of this evidence is assigned for error.

Much of this evidence was wholly irrelevant and had no tendency to prove any assent, either express or implied, to an unconditional surrender of the slaves in controversy to the appellant, or any abandonment of her life estate in them. That one of the heirs may have taken the slaves allotted to him out of the state with respondent's knowledge, is entirely consistent with the conditions on which she parted with them

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and with the right she asserts to those in controversy. As to the acts and declarations of third persons concerning the division of the slaves, and their valuation as it respected respondent's life estate, it is not perceived how she is to be affected by them without showing that she had knowledge of them and gave her assent or acquiescence in some form or other. The evidence tended to prove not how the respondent understood the arrangement, but how it was understood by other persons, and was properly excluded. The appellant also offered to read in evidence a letter of Jno. S. McCune to Samuel C. McCune, which was excluded. This letter was dated St. Louis, October, 1852, about two months after the division of the slaves took place, and relates to matters foreign to the issue. The objections to the other evidence excluded apply with equal force to this.

On the part of the respondent the court instructed the jury that they might infer a gift from the circumstances of the case in the absence of acts and declarations to the contrary, but that inference may be rebutted by acts or declarations made at the time to the contrary, and if they find that plaintiff, when she assented to the division of the slaves, attached any condition to that assent, it was not necessary to communicate that condition to the defendant, but she can only be held to have parted with the property upon such conditions. The court, on its own motion, instructed the jury, submitting to them the question of the intent and purpose with which the slaves in controversy were delivered to the appellant, and that if there was a delivery to appellant shortly after his marriage with respondent's daughter without notifying him of any conditions, or that she intended to loan the slaves only, the law would presume a gift of her life interest in the slaves as an advancement, but that this presumption might be rebutted by the evidence. The jury were also told by an instruction given at the instance of appellant, that if the slaves were delivered to him with the understanding on the part of respondent that she could reclaim them at pleasure, yet they ought to find for defendant if she afterwards

abandoned her right. The other instructions asked by the appellant, which were refused, need not be noticed in detail. Several of them assert a proposition, the converse of that contained in the instruction given at the instance of the respondent; and the others are based upon the hypothesis of a gift of the slaves, and an abandonment from lapse of time.

The instructions given present the law of the case fully and fairly to the jury upon the evidence. The first instruction only asserts in effect that a party can not be divested of his property without his consent, and that when he does part with it he may annex such lawful conditions to the transfer as he may think proper. This is substantially the instruction. There is no controversy as to the right of the respondent to the property under the will, nor as to the right of the appellant to a share of it in right of his wife at the termination of the widow's life estate. It is insisted, however, that, having consented to a partition of the slaves and a delivery of possession of a part of them to the appellant, without notifying him of the condition she annexed thereto, she can not now avail herself of it, in seeking to reclaim them. If the executor acted prematurely and without authority in making partition of the slaves and delivering them to the heirs, then such illegal act can not divest the title of respondent, and she can reclaim them at any time, as she could recover any other property to which she might be entitled. If the partition and the delivery pursuant to it were made with the intention and expectation on the part of the heirs and executor that it should be final, and pass the life estate of the widow, it was no act of hers, no arrangement to which she was a party, and by which she can not be bound unless it was in accordance with the terms she prescribed. In such case the possession acquired by the appellant was acquired without the consent of the respondent and does not bind her.

John S. McCune, through whose instrumentality the partition was made, seems to have acted for both parties, and not as the agent peculiarly of the respondent. But, if he is to be regarded as the agent of the respondent, he was an

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agent with limited and specific powers as to the particular transaction, and his agency must be construed according to its real nature and extent; and the other party must have acted at his own peril, and was bound to inquire into the nature and extent of the authority actually conferred. In such cases there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has authorized, because he has not misled the confidence of the other party who has dealt with the agent. Each party is equally innocent, and, in a just sense, it can not be said that the principal has enabled the agent to practice any deception on the other party. (Story on Agency, 122-4.)

The judgment will be affirmed; Judge Napton concurring. Judge Scott absent.

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MILLER, Appellant, v. IRON COUNTY, Respondent.

1. The county courts are not agents of their respective counties in exercising their statutory jurisdiction over probate matters, guardians, minors, lunatics, idiots, &c. In this field of jurisdiction they are a branch of the state judiciary, and the counties can not be held responsible for their action.

*Appeal from Iron Circuit Court.*

This was an action under the provisions of the act of December 12, 1855, (R. C. 1855, p. 47,) against the county of Iron to recover damages alleged to have been sustained by the plaintiff by reason of the death of her husband through the gross negligence of the county court of Iron county in not appointing a guardian for and in not confining one Richard Callaway, who had been found, under an inquisition had by said county court, to be of unsound mind and dangerous to be permitted to run at large. Plaintiff's husband was, it was alleged, killed by said Callaway. The court sustained a demurrer to the petition.

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Miller v. Iron County.

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*Perryman & Carter*, for appellant.

I. The court erred in sustaining the demurrer. (2 Denio, 433; 1 Sandf. 223; 3 Hill, 612, 531; 3 Comst. 463; 12 Mo. 414.)

*Pipkin*, for respondent.

I. The court properly sustained the demurrer. (1 Hill, 545; Hill, S. C., 571; 1 Amer. Lea. Cas. 622.)

NAPTON, Judge, delivered the opinion of the court.

We consider it against all the well settled principles of law to hold a county responsible for the action of the county court, held within its limits, in the exercise of that jurisdiction over insane persons confided to it by statute. We do not regard the county court of Iron county as in any proper sense a mere agent or servant of that county in exercising its statutory jurisdiction over probate matters, over guardians and minors, lunatics, idiots, and insane persons, apprentices, &c. In this field of jurisdiction, the court is a branch of the state judiciary, exercising in fact a jurisdiction originally found in the chancery courts and ecclesiastical courts of England, and conferred here by statute upon these county tribunals. It would be quite as reasonable to sue the county of Iron for injuries sustained by some action or non-action of the circuit court. The county courts, in matters of this sort, are as much state courts as the circuit courts. Their judges were formerly appointed by the governor, and, although they are now elected by the people of the county, yet when elected, they constitute a part of the state judiciary. They administer the laws of the state in matters entrusted to their jurisdiction; and the counties as municipal corporations, and the people of the counties, have no control over their action, and of course can not be held responsible for it. Their jurisdiction, it is true, is confined within the bounds of their counties, so far as persons are concerned, but so it is in reference to the circuit courts.

This view of the subject presents a fatal objection to the



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Kretschmar v. Board of Commissioners of St. Louis County.

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action in this case; we have, therefore, not deemed it necessary to look into the question discussed in the briefs. How far a municipal corporation is liable for the acts of commission or omission of its officers and servants, is, we think, a matter not necessary to be determined in this case.

Judgment affirmed; the other judges concur.




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KRETSCHMAR v. BOARD OF COMMISSIONERS OF ST. LOUIS COUNTY.

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1. The clerk of the St. Louis criminal court is entitled to the fees allowed by the third section of the act of February 12, 1857. (Sess. Acts, 1857, p. 63.) He is not restricted to the fees allowed in the eleventh section of the act of December 5, 1855. (R. C. 1855, p. 756.)

*Application for Mandamus.*

This was an application to the supreme court for a mandamus directed to the Board of Commissioners of St. Louis county, commanding said board to allow and order to be paid certain items contained in a fee-bill allowed by the St. Louis criminal court in favor of the clerk of said court. These items consisted of fees charged and allowed in favor of said clerk under the third section of the act of February 12, 1857. (Sess. Acts, 1857, p. 63.)

*Cline & Jamison* and *Lackland*, for Kretschmar.

*S. H. Gardner*, for Board of Commissioners.

- I. The act of 1855, in so far as it relates to the fees in criminal cases that may be charged against the state and county, has in no respect been repealed or modified. The plaintiff can charge the defendant such fees, and at such rates, only as are authorized by the act of 1855.

NAPTON, Judge, delivered the opinion of the court.

The third section of the act of February 12, 1857, entitled "An act to amend an act entitled 'An act to regulate

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fees,' approved December 5, 1855," provides that "the clerks of the several circuit courts of this state, and of the court of common pleas of the county of St. Louis, and of the St. Louis land court, shall receive, *in all civil proceedings*, the following fees for their services." Here follows an enumeration of the fees. The section then concludes thus: "And the clerks of county and probate courts, and *of the criminal court of St. Louis county*, and of all courts of common pleas having civil jurisdiction, the same fees as above for like services." The eleventh section of the act of 1855, to which this law is an amendment, provided "that the clerks of the several courts of this state possessing criminal jurisdiction, shall be entitled to the following fees for their services in criminal proceedings; and no fee in such proceedings shall be allowed by virtue of any other provision in this act contained." And then follows the fees allowed the clerks of criminal courts in criminal proceedings.

The question submitted upon the application for a mandamus in this case is, whether the clerk of the criminal court is entitled to the fees given by the third section of the act of February 12, 1857, *in criminal cases*.

Some of the services enumerated in the third section above referred to are such as may be rendered in both civil and criminal cases; but it is perfectly clear that no clerk in the state, except the clerk of the criminal court of St. Louis, could claim any of the fees therein specified in any criminal case. The fees by the first part of the section are restricted to civil cases; but we think it is equally clear that the clerk of the criminal court of St. Louis is entitled to these fees by the express words of the act.

Why the clerk of the criminal court of St. Louis was allowed fees, which by the law are prohibited to all other clerks in criminal cases, is not a subject for our inquiry, when it appears to be the plain intention of the legislature that this discrimination should be made. As this clerk is the clerk of a court which has no jurisdiction in civil cases, if we apply the restriction upon the fees made in the first

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part of the section to him we annul the provision in his favor altogether. We must understand this provision, so far as it regards the criminal court in St. Louis, as repealing the restriction of the eleventh section of the law of 1855.

Judge Ewing concurring, the mandamus upon the commissioners will, according to the understanding of the counsel on both sides, be made peremptory.

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NAYLOR'S ADMINISTRATOR, Plaintiff in Error, v. MOFFATT,  
Defendant in Error.

1. Letters testamentary granted to an executor in one state have no extra territorial force.
2. Letters testamentary granted to an executor in Virginia give him no title to property of the testator in this state, and he can not, in his official capacity, maintain an action in this state to recover such property.
3. A grant of administration by a county court is a judicial act, and as such must be conclusive on all other courts until it is revoked; the validity of such grant can not be attacked collaterally.
4. An administrator duly appointed by a county court of this state is entitled to the possession of the personal property of the deceased found here, and his right to sue for such possession is exclusive of the foreign executor, distributees, and all others.

*Error to Knox Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Broadhead*, for plaintiff in error.

I. The circuit court could not look behind the action of the county court to determine whether that court had acted properly in granting letters of administration. The validity of the grant of letters can not be attacked in a collateral proceeding. (24 Mo. 265.) If the petition disclosed the fact that the property had been administered on by the executor in Virginia, the estate settled up, the debts paid, and distribution made, then it might be questionable whether another administration could be granted here. No such

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facts appeared on the face of the petition. It does not even appear that the executor accepted the appointment, or that he had letters testamentary granted him in Virginia. The property is here, and for aught that appears there may be debts due here.

*Dryden & Lipscomb*, for defendant in error.

I. The demurrer was properly sustained. The administration was not closed; was in Angus W. McDonald, the executor, and the letters of administration granted plaintiff could not divest his title. If the administration was closed, then the distributees alone had the right. The administration of Angus W. McDonald is the primary administration. His right to the possession attached in Virginia and followed the property to Missouri. (10 Mo. 141; 15 Mo. 118.) *Riley v. McCord*, 24 Mo. 265, has no application to the case.

EWING, Judge, delivered the opinion of the court.

This was an action by Edward C. McDonald, administrator with the will annexed of the estate of William Naylor, for the recovery of certain slaves. The petition alleges that William Naylor died in the state of Virginia in 1840, leaving a will appointing an executor in that state, and that the slaves in controversy should be [free] upon attaining to certain ages therein specified; that the said will was duly admitted to probate in Virginia; that Susan Naylor, the widow of deceased, "under the provision of the laws of that state, for a part of her dower in the estate of the deceased, took the slaves in controversy" and brought them to Missouri, and kept them in her possession until her death in 1849, when the said slaves passed into the possession of her son John S. Naylor, who hired them out until his death in 1853 for the executor of his father's will, and [they] were held by him for the said executor, Angus W. McDonald, at the time of [the death of] him, the said J. S. Naylor; that after this, by some means not stated, defendant got possession of said slaves; that letters of administration with the will

annexed were granted to plaintiff by the county court of Shelby county, by virtue of which he claims the property in question.

Defendant demurred to the petition. The demurrer was sustained, and judgment rendered thereon, and the cause is brought to this court by writ of error. The grounds upon which the demurrer appears to have been sustained, and which are insisted on here, are, that if the estate of Naylor in Virginia has not been closed, then the executor of his will in that state is the proper party to sue; and if it has been closed, the distributees are the proper parties plaintiffs.

It is not perceived how a question could well arise upon the facts alleged in the petition as to the administrator's right to institute suit for the recovery of the property in controversy. It is only upon the hypothesis of the plaintiff's being an executor *de son tort* that any such question could arise. But he can not be an executor *de son tort* and at the same time a rightful executor. The petition avers the plaintiff to be duly appointed, and this is admitted by the demurrer; but whether rightfully so or not can not be inquired into in a collateral proceeding. The grant of administration by the county court is a judicial act, and as such must be conclusive on all other courts until reversed by appeal, or revoked by the court itself. If the plaintiff is an administrator regularly appointed, as the demurrer admits, then his right to all the personal property of the deceased found here is unquestionable; and of course his right to sue is exclusive of the foreign executor, distributees, and of all others whomsoever. The grant of administration to plaintiff vests in him the legal title to the property; and he is to all intents and purposes the legal owner, although he is so in the character of trustee. The letters of the foreign executor have no extra territorial force, and give him no title to property of the testator in this state; and he could not bring or maintain an action in his official capacity in this state to recover it. His title does not extend beyond the limits of the state

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of the testator's domicil, and the movable property therein. (Sto. Conf. of Laws, § 512.) Whatever right he as executor may acquire to the property in question is by virtue of our own law. So that as a question of law arising upon the facts averred in the petition, there can be no doubt of the plaintiff's right of action to recover the property in question, irrespective of the state of the primary administration in Virginia, whether it is closed or not. The administration here is ancillary to that in the state of Virginia, and the rights of heirs and legatees are as effectually secured under it as under the primary administration there. If there are no debts, the property will be disposed of according to the will of the testator, or it may be transmitted to the executor in Virginia. (1 R. C. 1855, p. 168-9.)

The judgment will be reversed and the cause remanded. The other judges concur.



## REYBURN, Appellant, v. CASEY, Respondent.

1. The time of limitation upon an instrument in the following form, "Received of A. for B. one hundred and eighty dollars. November 16, 1850. [Signed] C." is ten years; such an instrument is a "writing for the payment of money" within the meaning of the first clause of the second section of the second article of the limitation act of 1845. (R. C. 1845, p. 716.)

*Appeal from Washington Circuit Court.*

*Carter*, for appellant.

- I. The court erred in refusing the instruction asked. (6 How. 550; 1 Smith, 8; 1 Morr. 321; 15 Ohio, 130; 30 Maine, 118.)

*Noell*, for respondent.

- I. The receipt is no evidence of indebtedness. It is merely a receipt for money; there is no promise to pay, or admission of indebtedness. This is not an action or a written instrument for the payment of money.



EWING, Judge, delivered the opinion of the court.

This was an action on the following instrument, "Received of H. Doane for Samuel A. Reyburn, one hundred and eighty dollars. Potosi, November 16, 1850. [Signed] J. H. Casey."

The defendant pleaded the statute of limitations, alleging that the action did not accrue within five years before the commencement of the suit. There was a judgment for the defendant; and motions for a new trial and in arrest of judgment being overruled, plaintiff brings the cause to this court by appeal. The court was asked to declare the law to be that the lapse of five years was no bar to an action on the instrument sued on, but that it might be brought at any time within ten years. This was refused, and the only question is whether the instrument is a writing for the payment of money under the statute.

The second clause of the second section of the limitation act provides that an action upon any writing, whether sealed or unsealed, for the payment of money or property, can only be commenced within ten years after the cause of action shall have accrued. The broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes or to such instruments as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed. Upon this principle it has been decided that a due bill was a good promissory note, for, although no promise is expressed, it is inferred from the acknowledgment of indebtedness. (*Kimball v. Huntington*, 10 Wend. 68.) The word "borrow" has been held sufficient to imply a promise to pay. In *Hanon v. Dugan*, 6 Dana, 341, it was held that an instrument in which the defendant acknowledged that he had "borrowed" a sum of money from the plaintiff was a note for the direct payment

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Teass' Adm'r v. Boyd.

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of money; that the word "*borrowed*" imported in itself a promise to pay as strongly as the word "due." To the same effect is *Cummings v. Freeman*, 2 Humph. 144.

We think that the defendant, in saying he had received the money for plaintiff, very clearly acknowledges an indebtedness to him; that the admission that he has plaintiff's money is an acknowledgment that it is due, or that he owes it, all which expressions have been held sufficient to imply a promise of payment.

The other judges concurring, the judgment will be reversed and the cause remanded.

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TEASS' ADMINISTRATOR, Appellant, v. BOYD, Respondent.

1. A compliance within the time agreed upon with the condition upon which a conditional sale of a chattel is to be void or the property returned reverts the title; and an offer to comply, or a tender of the money, is equivalent to payment, at least so far as to enable the vendor to maintain his action at law for the property or its value.

*Appeal from Warren Circuit Court.*

*Wells*, for appellant.

*Morsey* and *E. A. Lewis*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This action must be regarded as an action for the recovery of specific personal property, or for the recovery of money. The petition, it is true, is essentially defective, regarding it in any light; but it is certainly not intended as a bill for a specific performance of a contract, for no circumstances are alleged to exist which would render damages at law an inadequate compensation for its breach. It is not a bill for the redemption of mortgaged property, for a mortgage is not alleged. The complaint states the case of a conditional sale

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Mitchell v. Williams.

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of a slave, but does not aver that the purchase money was tendered to the defendant according to the alleged terms of the contract. In a conditional sale of a chattel, a compliance with the condition, upon which the sale is to be void or the property returned, within the time agreed upon, revests the title; and an offer to comply, or a tender of the money, is equivalent to payment, at least so far as to enable the vendor to maintain his action at law for the property or its value. (*Bennett v. Holt*, 2 Yerg. 6.) And this, we suppose, is what was intended in this case, and so the action was regarded upon the trial. A jury was waived by consent of both parties and the case submitted to the court. All the testimony offered in the case was admitted without objection. No instructions are preserved on the record. Under these circumstances it is impossible for this court to know what point was decided by the circuit court, except that the verdict and judgment were for the defendant.

The judgment must be affirmed; the other judges concur.



MITCHELL, Defendant in Error, v. WILLIAMS, Plaintiff in Error.

1. Judgment reversed for want of a finding of the facts by the court.

*Error to Jefferson Circuit Court.*

This suit was commenced April 9, 1856.

*Noell & Frissell*, for plaintiff in error.

*Pipkin*, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

This case was tried under the practice act of 1849, and there was no finding of facts by the court; the judgment is therefore reversed and the cause remanded. The other judges concur.

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Gibson v. Tong.

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## GIBSON, Respondent, v. TONG, Appellant.

1. In an action for a forcible entry and detainer the title to the premises can not be inquired into. Mere title in the plaintiff at the time of the alleged entry, unaccompanied by possession, can avail him nothing.
2. Instructions given to a jury should be supported by the evidence.

*Appeal from St. François Circuit Court.*

The instructions given by the court and referred to below in the opinion are as follows: "1. If the jury find that Reed held possession of the premises in controversy exclusively and in his own right, and that he let a part of the premises to Palmer, directing him to pay rent to the plaintiff, and surrendered the other tenements to Gibson by delivering to him the keys, and that after thus gaining possession, and after Palmer had left the occupancy, Tong, the defendant, entered on the possession of Gibson and assumed the occupancy, then they will find a verdict for the plaintiff and assess his damages for the detention thereof, and also find what is the monthly value of the premises. 2. But if the jury find that Alfred Reed held possession of the premises in controversy for the firm of Evans & Reed, of which he was a partner, and that without the knowledge or consent of Evans, his co-proprietor, he admitted Palmer into the occupancy of part of the premises, and surrendered the whole to Gibson by directing Palmer to pay his rent to him and delivering up the keys of the other tenement, then the possession thus taken by Gibson was a wrongful possession and conferred no such right to the possession as can be made a sufficient basis for a recovery in the cause."

*Frissell*, for appellant.

*Noell*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a writ of forcible entry and unlawful detainer brought by the plaintiff Gibson against the defendant Tong.

The cause was taken by *certiorari* from the justice to the circuit court, where the plaintiff had judgment.

The sixteenth section of the act concerning forcible entries and unlawful detainers directs that when the jury is sworn the justice shall cause the complaint to be read to them, and then call upon the plaintiff for proof to sustain the same; but the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained or unlawfully detained the same. This section has never been so construed as to require the plaintiff to show any title in himself. A mere title in this proceeding avails the plaintiff nothing unless it is accompanied with the possession. He may have the legal title, and yet be guilty of an unlawful entry. The statute merely means that the plaintiff shall have the peaceable possession of the premises at the time of the unlawful entry. If he has that, he can not be turned out unlawfully or by force, but only by due course of law.

The instructions given by the court were erroneous, as there was no evidence to support them. The only fact in the record which had the least tendency to show that the plaintiff was possessed, was the direction of Reed (who last had the possession of them) to his tenant Palmer, to pay the rent to the plaintiff. Palmer, it seems, had only a portion of the premises, and the court assumes that the keys of the other tenements not possessed by Palmer were delivered to the plaintiff. Nothing is stated in the record in relation to this delivery of keys to the plaintiff. Of course, then, there could be no authority for the court to assume the existence of such a fact in an instruction. But if there was a direction to Palmer to pay the rent to the plaintiff, and a delivery of keys as assumed, these were circumstances from which the jury would have determined whether the plaintiff was in the possession of the premises, and it was not for the court to intimate to them that as a matter of law they constituted a possession. Judgment reversed and the cause remanded; the other judges concur.

HOWELL, Defendant in Error, v. BELL, *et al.*, INTERPLEADERS,  
Plaintiffs in Error.

1. A stipulation in a deed of trust of land and slaves, which is duly recorded, that the grantor shall remain in possession of the property conveyed until the maturity of the debt secured, does not of itself render such deed of trust void on its face as to creditors by constituting it a conveyance to the use of the grantor within the meaning of the first section of the act concerning fraudulent conveyances.

*Error to St. Charles Circuit Court.*

Francis Howell instituted suit by attachment against Andrew J. Coshow and William Coshow, and levied the attachment upon certain slaves. James Bell, Abraham S. Matson and George Murdock interpleaded, claiming said slaves by virtue of a certain deed of conveyance executed by William Coshow and wife before the date of the attachment. At the trial of the issue raised upon the interplea, the plaintiffs in the interplea offered in evidence said deed of conveyance. This deed, so far as it is necessary to set it forth, is as follows: "This deed, made and entered into this twentieth day of May, 1858, by and between William Coshow and Elizabeth his wife, of, &c., parties of the first part, and James Bell and Abraham S. Matson, of, &c., parties of the second part, and George Murdock, of, &c., party of the third part, witnesseth, that the said parties of the first part, in consideration of the debt and trust, &c., do, by these presents, grant, bargain and sell, convey and confirm unto the said parties of the second part, the following described real estate situated in the county and state aforesaid, to-wit: [describing it]; also the following described personal property [describing the negro slaves upon whom the attachment had been levied]. To have and to hold the same, with the appurtenances, to the said parties of the second part and to their assigns legally constituted according to the effect of this conveyance, forever. In trust, however, for the following purposes: Where-



as the said William Coshaw is justly indebted to the party of the third part upon a certain promissory note by him executed and delivered to the said party of the third part, as follows, to-wit: for the sum of \$15,000, due thirteen months after date, with interest at the rate of ten per cent. per annum from date till paid. Now if the said promissory note shall be well and truly paid and satisfied at maturity, with the interest as aforesaid to its true tenor and effect, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part; but if default shall be made in the payment of said note or of the interest due thereon or any part thereof, then this deed shall remain in force, and the said parties of the second part or either of them may take possession of said property, (it having been left in possession of the said party of the first part until the sale hereinafter mentioned,) may proceed to sell," &c. This deed was recorded May 21, 1858.

The introduction of this deed was objected to on the ground that it was fraudulent on its face. The court sustained the objection. The interpleaders then suffered a nonsuit, with leave, &c.

*Broadhead, Bates, Lewis and Alexander*, for plaintiffs in error.

I. The deed in question is not a conveyance to the use of the grantor. There is no power to dispose of the property or to change its nature; in other words, it is not a mere colorable conveyance, by which nominally the trustee has the property, but really the grantor has the whole title. (See *Brooks v. Wimer*, 20 Mo. 506; 11 Mo. 369; 20 Mo. 468.) To make the conveyance void on the ground of fraud, it must be to the sole use of the grantor. (See *Stanley v. Bunce*, 17 Mo. 269; 15 N. Y. 122; 17 Barb. 309; *Burr. on Assign.* 436; 16 Ala. 560; 22 Ala. 238.) If this deed be void, then all mortgages and deeds of trust are void. By the very terms of the eighth section of the act concerning

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Howell v. Bell.

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fraudulent conveyances, the grantor may remain in the possession of the property.

*Knox & Kellogg, C. Wells and Hinman*, for defendant in error.

I. The deed is void as creating a trust to the use of the party making it. (R. C. 1855, p. 802; 27 Mo. 270; 24 Mo. 575, 20 Mo. 503; 15 Mo. 459; 2 Swan, 208; 26 Ala. 172; 27 Al. 336; 2 Conn. 211; 12 Gratt. 208; 18 Ala. 734.) At all events it is void as to the personal property therein conveyed, and if void in part it is void altogether. (5 Cushm. 481; 7 Gill, 446.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is whether a deed of trust conveying certain lands and slaves to a trustee to secure the payment of a debt due the *cestui que trust*, with a power in the trustee to sell upon the maturity of the debt, is void upon its face by reason of a stipulation in it that the grantor should retain possession of the property conveyed until the expiration of the credit agreed on; and our opinion is, that such a reservation does not vitiate the deed.

The cases decided by this court upon the construction of the first section of the statute concerning fraudulent conveyances do not lead to the conclusion that the mere retention of possession in the grantor of property conveyed in trust, whether expressly authorized by the terms of the deed or not, is in itself a fraud. Much less is it to be inferred that an express stipulation in the deed to this effect makes the deed fraudulent on its face. Although this privilege of retaining possession is to some extent beneficial to the grantor, it is not such a benefit as makes the deed a trust to the use of the grantor.

The distinction between this privilege and the reservation of a power to sell or dispose of all the property embraced in the conveyance is obvious enough. Where a stock of goods is conveyed, and the grantor reserves, not only the posses-

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Whitehead v. Stoddard County.

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sion, but the right to dispose of them all; or, where the property conveyed is of a character which would be consumed in the use, the deeds may well be said to be in trust to the use of the persons making them. But the retention of the possession of a tract of land and a number of slaves, conveyed to a trustee to secure a debt, is altogether consistent with actual good faith, and entirely promotive in any contingency of the substantial interests of the grantee. The creditor may be really benefited by such an arrangement, and can not be injured, whilst the debtor is better enabled to pay off his debt.

But we do not consider this question as open to argument or authority, for it seems to us that the statute itself has settled it. The eighth section of the act provides that, where possession does not accompany a mortgage or a deed of trust, the deed must be recorded in order to be valid. This section is a legislative interpretation of the first section, and amounts to a declaration that retention of possession by the grantor in a deed of trust or mortgage is not a trust in the grantor within the first section of the act; for all deeds which fall within the first section are void as against creditors, whether recorded or not. But as the deeds of trust, where possession is left in the grantor, may be valid if recorded, it follows that the mere circumstance of retaining possession is not understood to be a decisive mark of fraud such as to render a deed void upon its face as a matter of law. Judge Ewing concurring, judgment reversed and cause remanded. Judge Scott absent.



WHITEHEAD, Respondent, v. STODDARD COUNTY, Appellant.

1. An appeal will not lie under the general law of this state by a county from a judgment of a county court allowing an account against the same.
2. This rule applies to the district county court organized under the act of March 1, 1855, (Sess. Acts, 1855, p. 474,) for the counties of Stoddard, Dunklin and Butler.

*Appeal from Bollinger Circuit Court.*

Noell, for appellant.

I. The court erred in dismissing the appeal. An appeal lay in behalf of the county.

EWING, Judge, delivered the opinion of the court.

The respondent presented a claim against Stoddard county for fees and services as jailor in a criminal case, which was allowed in part by the district county court, from which the county took an appeal to the circuit court. A change of venue was taken to the Bollinger circuit court, where the appeal was dismissed. From this judgment the county has appealed to this court. The only question is whether an appeal by the county will lie from the district court.

By an act of the general assembly, approved March 1, 1855, several counties, among which was the county of Stoddard, were constituted a county court district, with a single judge, to be chosen at stated periods by the people of such district. The court thus established has the same powers and jurisdiction of other county courts of the state, but the act contains no provision relative to appeals, leaving that matter subject to the general law. The act to establish courts of record and prescribe their powers and duties confers upon circuit courts appellate jurisdiction from the judgments and orders of county courts and justices of the peace in all cases not expressly prohibited by law ; and gives a superintending control over them. The ninth section of the third article of the act to establish and regulate county treasuries (R. C. 1855, p. 528) provides that, if any account shall be presented against a county, and the same or any part thereof shall be *rejected* by the county, the *party aggrieved* thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to the circuit court. This provision gives an appeal only to the party whose claim against the county has been rejected in

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whole or in part, and by the clearest implication *denies* it to the county where the claim is allowed, and is equivalent to a prohibition in the sense of the statute referred to. The appellate jurisdiction of the circuit court, in cases where a county was one of the parties, is the special subject matter of the provision last quoted, and the statute, in giving the right of appeal to the claimant only, by a necessary intendment made the county an exception to the general rule. This view of the subject is supported by the general tenor of the act regulating county treasuries, and particularly the third article, the first section of which gives to the county court the power, and makes it their duty, to audit, adjust and settle all accounts, to which the county shall be a party; to order the payment of money found due by the county; to enforce the collection of all money due the county; in short, they have the sole management of the finances of the county, and hold the legal key of the county treasury. As auditors of the county, all accounts against it must first pass their inspection, and be allowed before payment.

The theory of the statute in question as well as the general legislation on the subject would seem to contemplate no other guarantee of fidelity, on the part of these courts as guardians of the treasury, than such as is implied in the relation they sustain to the county, the manner in which they are constituted, and the interest its members are presumed to have in common with the citizens, who share alike the county burdens, and who would be alike affected by any want of faithfulness in executing their trust as guardians of the public treasury. These considerations may not apply with the same force to those counties whose courts are organized in the manner provided by the special act referred to; but the legislature, in introducing the change, has failed to provide a remedy for any evils that may result from it.

The judgment will be affirmed; the other judges concurring.

EVANS, Appellant, v. HAEFNER *et al.*, Respondents.

1. Where land is condemned in behalf of a railroad company, the validity of such condemnation can not be called in question in a collateral proceeding.
2. In proceedings instituted by a railroad company to obtain the condemnation of private property, the court, on confirming the report of the commissioners, ordered the plaintiff to deposit the compensation assessed forthwith with the clerk of the court to the credit and on account of the defendant. The clerk tendered the money to the attorney of the defendant and he refused to receive it. *Held*, that the company was justified in entering upon and taking possession of the land condemned.
3. Where land is condemned in behalf of a railroad company, the decree of condemnation, it seems, vests in the company the title to the earth and minerals found above the grade of the road, and whose excavation is necessary for the construction of the road; minerals lying below the level of the road, and whose excavation is not necessary in the construction of the road, belong to the owner of the land condemned.

*Appeal from Washington Circuit Court.*

This was an action to recover possession of certain lands and damages for entering the same and cutting down and destroying timber, and for digging up and carrying away rock, stone, mineral and gravel, &c. The defendants based their defence upon a condemnation of the land in controversy in certain proceedings instituted in the Washington circuit court in the name and in behalf of the St. Louis and Iron Mountain Railroad Company against the plaintiff and his wife. In these proceedings the land sued for was condemned, and the court, in its order confirming the report of the commissioners, made the following order: "It is further ordered that the plaintiff deposit in the hands of the clerk of this court, William A. Matthews, forthwith, to the credit and on the account of the defendants, the said sum of nine hundred and twenty-five dollars, to be paid over to the defendants as their compensation; and upon the plaintiff depositing said sum as aforesaid, it shall be entitled to enter upon, take possession of and use the said land, for the purposes aforesaid, during the continuance of its corporate existence." These proceedings were instituted in April, 1858.



The defendants also adduced in evidence the following instrument: "January 15, 1858. Whereas George B. Cole, Israel McCready, John Deane, J. H. McIlvaine, Andrew Casey, Samuel Singer, J. H. Morse and Thomas C. Johnson, a committee appointed by the citizens of Potosi, in the county of Washington, acting for themselves and such others as shall coöperate with them, parties of the first part, have proposed to the St. Louis and Iron Mountain Railroad Company, party of the second part, to establish a branch road from the main line of the St. Louis and Iron Mountain Railroad to Potosi, by the nearest and most practicable route; and whereas the said railroad company is willing to establish and locate said branch upon the considerations hereinafter named: Now, therefore, these presents witness: 1. That the said parties of the first part, for themselves, said citizens, hereby agree to and with the said railroad company to do the graduation, masonry, bridging, ballasting, clearing and grubbing, and all other work necessary to prepare said branch road for the laying of the track thereon. 2. The said parties of the first part further agree at their own expense to procure the right of way, and the necessary depôt grounds, and to cause the same to be conveyed to said company. 3. The said branch road shall be located upon the shortest, most practicable and cheapest route to be designated by the engineer of the St. Louis and Iron Mountain Railroad Company acting in concert with an engineer appointed by the said parties of the first part. 4. The cost of making the preliminary surveys on said route shall be paid by said railroad company except the wages of the engineer appointed by the parties of the first part. 5. When the graduation, masonry, &c., and all other work necessary to prepare said road-track for the laying of the rails shall be completed, delivered and accepted by said company, then the said party of the second part binds itself to furnish the iron rails, ties, spikes, &c., and to proceed without delay to lay down and complete said track, to erect the necessary buildings, provide rolling stock, and proceed to operate said road. 6. It is further agreed that said

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railroad company shall have the entire control and management of said road, and the regulation of the rates for passengers and freight thereon. 7. The said branch when completed shall, together with the appurtenances thereto, become the absolute property of the St. Louis and Iron Mountain Railroad Company. 8. The grade of such branch road shall not exceed seventy feet per mile. 9. When said road-bed, masonry, &c., are completed, delivered and accepted by said railroad company, the cost thereof shall be estimated by the engineers of both parties, not to exceed the cost of similar work on the main line; and, in case they can not agree, a third engineer shall be selected by them as umpire, and the decision of the majority shall be final. For the amount so fixed the said railroad company shall issue its stock to such persons and in such amounts as shall be directed by a committee of the citizens of Potosi. 10. The graduation, masonry, &c., on said branch road shall be commenced by the citizens of Potosi within three months and completed within twelve months from the date hereof. 11. If, at any time within which the work is to be commenced as above, it shall be found impossible to raise the necessary subscription among said citizens to complete said work, then the parties of the first part shall have the right to terminate this contract by notice in writing to said railroad company within said period. In testimony whereof," &c.

The St. Louis and Iron Mountain Railroad Company gave to Wm. Carter the following authority to procure the condemnation of the right of way for the Potosi branch railroad: "The undersigned, president of the St. Louis and Iron Mountain Railroad Company, hereby authorizes William Carter, Esq., the attorney at law employed by divers citizens of the town of Potosi, to use the name of said company in all necessary legal proceedings to procure the condemnation of the right of way for the Potosi branch of the S. L. & I. M. R. R. It is expressly understood, however, that the said company shall in no event be held responsible for the professional fees of the said attorney, nor for any costs or expenses

ses attending the procurement of said right of way, but the same are to be wholly borne by the said citizens of Potosi. [Signed] Madison Miller, president. St. Louis, March 29, 1858."

The trespasses complained of were committed by the defendants in entering upon the land of plaintiff under the authority of the above contract for the purpose of constructing said branch railroad track. It appeared that some gravel was dug up for embankment purposes outside the line of the road as condemned.

The court, at its own instance, gave the following instructions to the jury: "The judgment of the court rendered at the May term, 1858, in the proceedings of the St. Louis and Iron Mountain Railroad Company to condemn the roadway of the branch road through the land and town lots of the plaintiff, and the deposit of the amount of money required by said judgment with the clerk, was a complete investiture of the company of the title to the land condemned from the date of said deposit, and is a full justification to the company, her agents and contractors, to enter on the land thus condemned, and construct their road, doing no damage to the adjoining land of the plaintiff; and such judgment precludes all inquiry by the jury into the value of the land taken or the damages done to the adjoining land in consequence of the location of said road, the same having been adjudicated and settled by the judgment aforesaid. The damages sustained by the plaintiff for taking and using the gravel on adjoining land, and any injury done to the adjoining lands, by throwing down and keeping open the fences, if proven to have been done by the contractors or their hands, the defendants are liable therefor; and the jury will find for the plaintiff such amount therefor as, under all the circumstances, they may think right. The contract of the defendants with the St. Louis and Iron Mountain Railroad Company read in evidence is a full authority from the company to them to enter upon the said roadway and construct their said branch road. Although the defendants were entitled to

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pull down the fences along the line of said road for the purpose of constructing their road, yet they could not by law do so in such manner as to expose his enclosed lands adjoining, but must keep up the fences so as to prevent such exposure, or they will be liable for any damages resulting from such exposure. The title vested in the company by the judgment aforesaid conferred on the company the right to all mineral, &c., found within the line of said roadway."

The plaintiff asked the court to instruct the jury as follows: "1. The St. Louis and Iron Mountain Railroad Company has no legal right to transfer their privilege of condemning private property to their use; and the contract of the 15th of January, 1858, read by defendants, and the written authority to Wm. Carter, dated March 29, 1858, confer no privilege on defendants to use the name of the company to condemn the plaintiff's land for the use of the Potosi branch road; and the proceedings had under said contract and authority, as read by defendants, constituted no defence to the action. 2. As to the trespass that may have been committed by defendants or their agents, or under their direction, outside of the eighty feet constituting the road-bed, the jury will find such damages as they believe the material taken was reasonably worth and the injury sustained will justify. 3. If the jury find from the evidence that the defendants or their agents or employees entered upon plaintiff's land as alleged in the petition and withheld the same from plaintiff, then they will find the defendants guilty and assess such damages as from the evidence it appears plaintiff has sustained. 4. There is no evidence before the jury that the St. Louis and Iron Mountain Railroad Company had any authority to construct the Potosi branch road mentioned in the defendant's answer. 5. The defendants, having failed to prove any tender of the damages assessed to plaintiff by the commissioners, are not justified in their entry upon plaintiff's lands. 6. Payment of the money in court and tendering the same to plaintiff's attorney is not a lawful tender in this case." The court refused so to instruct.

The jury returned the following verdict: "We, the jury, find the defendants guilty of the trespass complained of, except as for the land included in the roadway of the St. Louis and Iron Mountain branch railroad, and assess the plaintiff's damages at twenty-six dollars."

*Noell and Perryman*, for appellant.

I. The charter of the St. Louis and Iron Mountain Railroad Company, approved March 3, 1851, does not authorize the construction of the Potosi branch. (Sess. Acts, 1851, p. —; Sess. Acts, 1837, p. 273.)

II. If the charter does confer authority to construct branches, the power to condemn land for that purpose, if given at all, is given to the company for the public benefit. The power can not be transferred, farmed out, or assigned to anybody or party of men. Nor can the company loan the use of its name for that purpose. The project of constructing a branch road was a project of a few citizens of Potosi. The purposes for which the land was taken were private. (*Dickey v. Tennison*, 27 Mo. 373.)

III. The deposit of the damages assessed with the clerk of the court did not invest the company with the title. The instruction given was erroneous.

IV. The court erred in directing that the mineral found in the roadway became the property of the railroad company. The company obtained the right of way only.

V. The general law of this state giving to all existing railroad companies the privilege of taking private property is unconstitutional. A distinction should be taken between a special provision in the charter of a railroad company, the public purposes and objects of which appear on the face of the charter, and a general law conferring power indiscriminately on all railroad companies, without any reference to their objects, purposes or obligations. The general law imposes certain obligations on railroads organized under the act. These obligations are not imposed upon the chartered roads. (See *Redfield on Rail.* 14; *United States v. Arre-*

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dondo, 6 Pet. 691.) Upon what principle can it be said that a railroad a little over three miles is a work of public necessity.

*Cates, Frissell & Carter*, for respondents.

I. The St. Louis and Iron Mountain Railroad Company had power to make the Potosi branch. The proceedings and judgment of the court in the condemnation of the land are conclusive. The payment of the assessed damages into court gave power to said company and all others acting under them by contract or otherwise to enter on the land condemned and construct said railroad. The defendants had power and license from the company to grade and prepare said branch road for the laying of the track. Said company had the power to dig minerals, timber, &c., within the bounds of the land condemned, but not to convert the same to their own use. There was no error in refusing the instructions asked.

SCOTT, Judge, delivered the opinion of the court.

This was an action of ejectment and trespass *quare clausum fregit*, to recover the possession of some land and for damages for entering lands belonging to the plaintiff. The defendants, under a contract with St. Louis and Iron Mountain Railroad Company, built a road connecting Potosi, in Washington county, with the main stem, not exceeding three or four miles in length. The company had the land, on which the defendants built the road, condemned under the provisions of the general railroad act, approved February 24, 1853.

It is now objected to the condemnation that the charter of the St. Louis and Iron Mountain Railroad Company did not authorize the building of the branch road from Potosi to the main stem; that the company could not delegate to the defendants the right to construct the branch road; that it was a private enterprise of no public utility, for which private property could not be taken.



Waiving the inquiry whether these objections are well founded in the law and the facts, we will examine whether the propriety of the proceedings taken for the condemnation of the land of the plaintiff can be inquired into in this action. The condition of railroad companies would be a hard one, if they could not be assured, before a road was built, that they might rely with confidence on the validity of the condemnation under which they acted. If the law, under which they proceed, is a valid and binding one, and they conform to its provisions in condemning the land necessary for their purposes, it would be ruinous if the validity of those proceedings could be called in question in a collateral suit. One of the consequences of holding that a party could be held liable as a trespasser or a wrongdoer while acting under a condemnation conformable to the statute, would be that the party complaining of the injury might, in the exercise of his rights of peaceably redressing his own wrongs, enter upon a railway and abate it as a nuisance. (3 Blackf. 5.) A railroad company would never be safe in building a road. After condemning land under a law which authorized it, they would be left to the fluctuating opinions of the courts, and would have no assurance that the steps they had taken would be of any avail in a subsequent action against them. If the construction of railroads is a measure encouraged and promoted by the community as one in which its interests are involved, there would be no policy in leaving companies in this defenceless state. There is no hardship in this on him whose property is condemned for the public use. The legislature can exercise the right of eminent domain, providing just compensation for private property taken or applied to public use. They can make laws providing how this right shall be exercised. If the party to be affected by the exercise of it has notice, he can make all objections to the proceedings of the body discharging this duty. If he fails to make objections, or if his objections are made and overruled, on what ground can he recur to those objections in a collateral action? If, when the proceedings condemning private

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property for public use are reported and confirmed, they do not protect the companies entering on the land taken, of what use are they? In building roads companies should have an assurance that they are not at the mercy of those whose property may be applied to their use. The statute, under which the proceedings were had in this case, declares that they shall be final and conclusive. In the case of *Hamilton v. The Annapolis and Elk Ridge Railroad Company*, 1 Mary. Ch. 107, it was held that, the land having been condemned for the use of the road, and the inquisition returned to and duly confirmed by the proper county court, the propriety of the condemnation and use of the property could not be drawn in question in an incidental or collateral proceeding. The law is stated to the same effect in *Redfield on Railways*, 129, 684.

We see nothing erroneous in the conduct of the court in relation to the payment or deposit of the damages assessed to the plaintiff. The statute provides that the court shall direct to whom the money is to be paid, or in what bank or banking house, and in what manner it shall be deposited by the company. The order made was, that the company deposit with the clerk of this court forthwith, to the credit and on account of the defendants, the said sum of nine hundred and twenty-five dollars, to be paid over to the defendants. This was in effect an order directing the money to be paid to the defendant; and, if he refused to take it, we see no impropriety in its remaining with the clerk to be paid when called for. The clerk stated that he still holds the money ready for the plaintiff in this action. His attorney refused to receive the money on his account. Being a party to the proceeding, he knows where his money is, and that he can have it at any time. Under such circumstances, after doing all that could be done, it is now very unreasonable that the point should be made that the order did not justify the court in directing the jury that it was a full justification to the company to enter upon the land condemned.

The court instructed the jury that the title vested in the

company conferred on it the right to all mineral, &c., found within the line of said roadway. The land over which the road passed was mineral land. That fact, we suppose, was known to the commissioners, and they would regard it in estimating the damages assessed for the plaintiff. The mineral found below the bed of the road, and whose excavation is not necessary for the construction of it, would remain with the owner of the soil ; but, as to the portion that must be removed in order to build the road, we do not see on what ground the owner of the soil can claim it, more than the earth or rock that is removed. We do not see on what principle the ownership of the excavations can be made to depend on the question whether they are necessary or not in the building of the road. When the land is condemned, it is condemned to the bed of the road, and the property of that which is condemned vests, when the damages are paid or secured, without regard to the inquiry whether or not it will be necessary in the construction of the road. Whether the instruction of the court was right or wrong, as it appears that no mineral was taken from beneath the level of the road, the plaintiff was not injured by it. If the excavations belong to the owner of the soil, would it not be right to place them on his ground, and how then would he complain that his land had been injured by placing them upon it? Are not railroad companies sued for such injuries? Redfield says, "It is certain in this country, upon principle, that a railroad company, by virtue of their compulsory powers in taking lands, could acquire no absolute fee simple, but only the right to use the land for their purposes ; and it is very questionable whether a railway, in such case, is entitled to the herbage growing upon the land, or to cultivate the same, or to dig for stone or minerals in the land beyond what is necessary for their purposes in construction. In England, the statutes give all such minerals to the former owner of the land, except such as are necessary in the construction of the road, unless the same shall have been expressly purchased ; and in this country, no doubt the same construction would

be adopted in regard to all land taken by compulsory proceedings."

We do not see how the constitutionality of the general railroad law of February 24, 1853, can arise in this or any other case, when it is admitted that there may be roads to which its provisions may be constitutionally applied. It is conceded in the argument that the act would be constitutional when applied to the Pacific railway, because that road is for the general benefit, and private property may be taken for its use. But it is maintained that the same act is unconstitutional when applied to the road the subject of this controversy, because it is a mere private enterprise in which the public have no concern, and therefore private property can not be taken for its use. If the road was of the character attributed to it, and lands should be condemned for it, that would not show that the general law is unconstitutional, but only that its provisions had been perverted to a case to which they could not be constitutionally applied. The constitutionality of a law depends upon the terms in which it is written. If there is a state of circumstances to which it may be applicable consistently with the constitution, it is no argument against its validity that it may be perverted to cases not warranted by the constitution. If the law is applied to such a case, that does not make it invalid, but only shows that it has been misconstrued and perverted to a case to which, by the constitution, it was not applicable. The constitutional validity of a law can not depend on extrinsic facts or circumstances, but those facts and circumstances may determine the constitutionality of its application to any particular case. It follows, then, that whether the general railroad law could be made applicable for the condemnation of the road, the subject of this controversy, was a question involved in the proceedings of the commissioners; and as those proceedings stand confirmed, it, no more than any other question involved in them, can be made a subject of investigation in this controversy, they being final and conclusive. Judgment affirmed; the other judges concur.

## VALLÉ'S HEIRS, Respondents, v. FLEMING'S HEIRS, Appellants.

1. Where land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase money is applied in extinguishment of a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase money.

*Appeal from Madison Circuit Court.*

This was an action in the nature of ejectment. The plaintiffs, who are six of the seven heirs of C. C. Vallé, deceased, claim six-sevenths of one-third less three fifty-sixths of the Mine La Motte tract, containing about 24,000 acres. The case has heretofore been in the supreme court, whose decision is reported in 19 Mo. 454. The cause being remanded, the defendants, the heirs of Thomas Fleming, filed an amended answer. In this answer the defendants set up, as a bar to the recovery of one-half the land sought to be recovered, a deed executed in 1848 by the administrators of said C. C. Vallé in favor of said Thomas Fleming. The validity of this deed was affirmed by this court in the case of Vallé v. Fleming, 19 Mo. 454. The answer then proceeded to set forth, as to the remaining half of the interest claimed by the plaintiffs, that in 1838, said C. C. Vallé, ancestor of plaintiffs, died greatly indebted; that he died seized of the undivided third part of the Mine La Motte tract, subject to an unsatisfied mortgage executed thereupon November 6, 1837, to secure the payment of \$67,050; that after the death of said Vallé, the administrators of his estate applied to the county court for an order of sale in order to pay off debts and encumbrances, and particularly the debt secured by said mortgage; that the county court made an order of sale; that the administrators accordingly sold one-half of the interest of said Vallé in said tract to Lemuel Lamb, Elihu Chauncey and

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Thomas Fleming; and executed deeds\* conveying to said Lamb, Chauncey and Fleming said one-half of said one-third part of said tract for the sum or price of \$50,000; that said sum of \$50,000 was applied to and was paid for the exoneration and discharge of the estate of the said Vallé from the lien of the mortgage; that the purchase was made in good faith for full value; that said sum of \$50,000 was paid in satisfaction of the mortgage, and the residue of said sum of purchase money so bid by said persons at said sale by the administrators was paid to and received by said administrators; that if said sale and conveyance be not sufficient, by reason of any technical informality or defect, to vest the title in said purchasers, then defendants insist that the money paid to the administrators of Vallé and toward the satisfaction of the mortgage was the money of said Lamb, Chauncey and Fleming advanced by them at the instance of said administrators towards paying off the debts of said Vallé and toward the extinguishment and satisfaction of liens on his estate; the said Lamb, Chauncey and Fleming and the said administrators acting in perfect good faith, and all persons supposing and intending that said Lamb, Chauncey and Fleming should and would acquire a perfect title to said land. The answer then proceeds as follows: ["And the said defendants say that, notwithstanding the apparent and technical payment and extinguishment of said mortgage in manner and form aforesaid, equity will, under the circumstances above shown, treat the said mortgage as still subsisting and unsatisfied for the protection of the said Lamb, Chauncey and Fleming, and will subrogate them, the said Lamb, Chauncey and Fleming, to all the rights of the mortgagees therein, treating them, the said Lamb, Chauncey and Fleming, as assignees and purchasers of said mortgage for valuable consideration of them had and received. And defendants say that said Thos. Fleming, in his lifetime, purchased and acquired, for valuable consideration, all the interest, estate and property of the

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\* These are the deeds decided to be void and null by the supreme court when the case was on appeal before. See Vallé v. Fleming, 19 Mo. 454.



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said Lamb and Chauncey in and to the said tract of land supposed to be conveyed as aforesaid by the said administrators of said C. C. Vallé to the said Lamb and Chauncey ; and that he is the assignee for value of all the interest, claim and demand which the said Lamb and Chauncey had to the said sum of money paid and advanced as aforesaid by said Lamb and Chauncey toward the extinguishment of said mortgage. And these defendants are the legal representatives of the said Thomas Fleming, who has died since the institution of this suit ; and so these defendants are entitled to be substituted and subrogated to all the rights and privileges which the said mortgagees would enjoy if said mortgage were unpaid, and the said mortgagees were in possession under the same. And defendants say that they are in fact and in equity in possession of said tract of land as assignees of said mortgagees, and entitled to set up the same against any person and all persons impugning their title and possession thereto. And defendants are ready to account for the rents and profits of said land so mortgaged to the said commissioners in plaintiffs' petition mentioned, and to come to a reckoning with the said plaintiffs—charging them, said plaintiffs, with the interest of the said mortgage debt so paid as aforesaid. But defendants charge that the said plaintiffs have, at no time either before or since the institution of this suit, offered to pay off or discharge whatever may be due to said defendants on account of said mortgage. And defendants are ready to verify all the premises as this court may direct and appoint ; and they pray that an account may be taken by and under the direction of this court of what is due to those defendants for principal and interest on the said mortgage debt ; and that plaintiffs be decreed to pay the said defendants what shall so appear to be due on the taking of said account, together with the costs of this suit, on or before a day to be for that purpose by the court indicated and appointed ; and, in default of such payment, that the plaintiffs be foreclosed and forever barred of and from all right and equity of redemption of, in and to the said mortgaged premises and every

part of the same; and also be decreed to deliver and yield up to the defendants all deeds and writings whatsoever, in possession of said plaintiffs, relating to said mortgaged premises; and that the court here will make such further order and decree in the premises as the equity of the case may require."]

The portion of said answer above set forth and enclosed within brackets the court struck out on motion of plaintiffs. The cause was afterwards heard upon its merits and determined in favor of the plaintiffs, the court rendering judgment in their favor for six-sevenths of one-sixth of the Mine La Motte tract, excluding the sixteenth section in two several townships. It is deemed necessary to set forth the facts only so far as they throw light upon the action of the court in striking out a portion of defendant's answer.

*Leonard and Gantt*, for appellants.

I. The question is not merely whether the plaintiffs have a legal right to recover the land, but also whether the defendants have any equitable defence against the recovery. If the administrators' sale is valid, that transaction defeats the plaintiffs' supposed legal right; if it is void, yet, having been made in fact and the purchase money having been applied to pay off a mortgage upon the property as well as other debts of the ancestor, equity will not permit the heir to recover the land without first refunding the purchaser what he paid for it. (*Dufour v. Camfranc*, 11 Mart. 610; *Howard v. North*, 5 Texas, 302; *McLaughlin's adm'r v. Daniel*, 8 Dana, 182; *Hudgin v. Hudgin's adm'r*, 6 Gratt. 320.) *Jure naturæ æquum est, neminem alterius detrimento et injuria fieri locupletiores*. (Digest Book 50, tit. 17, 206; 1 Kame's Eq. 140, 153-4.) In the present case, the money paid by the purchasers was lost to them through the error that has intervened and goes into the pockets of the heirs, if they are allowed to recover the land without refunding it, and the amount of the gain thus made by the heirs is the precise amount of the debts paid out of the proceeds of the sale,

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which otherwise would have exhausted their property to that extent. (See *Kyner v. Kyner*, 6 Watts, 223; 1 Johns. Ch. 412; *Buchanan v. Clark*, 10 Gratt. 178; 22 Penn. State, 295; *Henshaw v. Frier*, 1 Bailey, 311; *Bentley v. Long*, 1 Stroblh. 50; *Law v. Huffman*, 12 Gratt. 629; *Gilson v. McCormick*, 10 Gill & Jo., 1 Maryl. 66; *Belchver v. Forney*, 29 Penn. 47; *Guasquet v. Robins*, 2 Louis. Ann. 408; 11 Gratt. 48; *Teed v. Caruthers*, 2 Young & Coll. 31; *Barnes v. Camack*, 1 Barb. 392; *King v. McVickers*, 3 Sandf. Ch. 192; *McLean v. Lafayette*, 3 McLean, 587; *Heighway v. Pendleton*, 15 Ohio, 735; 7 Barb. 29; *Hunt v. Hunt*, 14 Pick. 374; *Peltz v. Clark*, 5 Peters, 481.)

II. The deed made by the administrators of Vallé in 1839 is valid.

III. The defendants being the purchasers for value of the claim of the widow of C. C. Vallé to the land in controversy, they are entitled to the benefit of this purchase in an account with the heirs.

*Noell*, for respondents.

I. The sale made to Chauncey, Lamb and Fleming in 1839, so far as C. C. Vallé's interest was concerned, was void. (*Vallé v. Fleming*, 19 Mo. 454; 22 Mo. 310; 23 Mo. 342.)

II. The defendants have no right to be substituted or subrogated to the rights of the mortgagees. At the date of the deeds to Lamb, Chauncey and Fleming, the Mine La Motte tract was owned in common by Pratte, Linn and the representatives of Vallé, Pratte owning one-third, Linn one-third, and Vallé's representatives one-third. There were three deeds executed, one to Chauncey, one to Lamb, and one to Fleming. Each deed called for one-sixth; that is, the three deeds called for one-half of the tract. The deeds of 1839 to Chauncey, Lamb and Fleming did in fact convey to them all the land they bargained and paid for, not indeed out of the share of C. C. Vallé, but out of the shares of Linn and Pratte, who, between them, owned two-thirds, which was

more than sufficient to satisfy and did in fact satisfy the calls of their deeds, these calls only demanding in the aggregate one-half. If the title had failed to any part of the land bargained for, then the defendants, in their amended answers stricken out by the court, made no such case as entitles them to relief. The doctrine of subrogation and substitution can only apply to cases where the party is bound by law to pay a debt for another, which debt is secured to the principal by some lien other than that of the person so bound. The case of *Peltz v. Clark*, 5 Pet. 481, has no application here. There the sale was a valid sale. In this case the sale is void from the beginning. The claim is raised here to get back money upon a sale wholly void. (See 2 Brock. 254; 3 Ala. 302; 5 Watts & Serg. 356.) Volunteers will not be subrogated. (3 Paige, 117; 1 Sandf. 384; 8 Leigh, 588; 10 Serg. & Raw. 399.)

III. The court did not err in deciding that defendants could claim nothing for the dower of Mrs. Vallé. (*McClanahan v. Porter*, 10 Mo. 753; 17 Johns. 167.)

NAPTON, Judge, delivered the opinion of the court.

Assuming the deed from Vallé's administrator in 1838 to be void, by reason of the failure of the administrator to comply with the requirements of the statute, as was held by this court when the case was here before, the only question for our determination now is, whether the defence set up in the answer is a valid one in equity.

The maxim of the common law "*nemo debet locupletari ex alterius incommodo*" is one of those general principles of natural equity which receive at once, without examination or discussion, the approbation of every cultivated and well regulated mind. The same maxim, expressed more fully, is found in the civil law: "*Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores.*" The exact application of this principle, the same essentially in each system, has however been more extensively and more definitely illustrated and enforced in the Roman law than it has

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been under the common law and chancery system of English jurisprudence. The limits, within which it will be held applicable under our system of equity jurisprudence, are not so well settled as they seem to be under the Roman law and Spanish law, and under that modification of the civil law which prevails in Scotland.

To what extent this maxim has been practically adopted in the English and American equity law is a question which was very carefully and elaborately considered and discussed by Judge Story in a case very analogous to the present. In the case of *Bright v. Boyd*, 1 Story, 478, the real estate of a testator was sold by the administrator with the will annexed to pay the debt of the deceased. The property brought its full value, and the purchaser supposed himself to have obtained a good title, and accordingly made large and expensive improvements on the lots. It turned out that the administrator had not complied with the statute, and the sale was held bad and no title passed. The devisee sued in ejectment and recovered upon his legal title, which of course had not been divested by this invalid sale, and the purchaser and occupant brought his bill to compel the devisee, before he should be permitted to take possession under his judgment in ejectment, to pay for the improvements and for money advanced in buying up outstanding claims. Judge Story hesitated. The case was heard in 1841. In 1835, when his *Treatise on Equity Jurisprudence* was first published, Judge Story had intimated that such cases were beyond the reach of our equity courts, except when the party seeking to recover the estate required and called for aid from a court of equity, or unless there was some fraud; and that, where the party could recover the estate at law, a court of equity could not, unless there was some fraud, relieve the purchaser. (2 Story Eq. § 1238.) Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige, 390, had expressed the same opinion, although he admitted that, after a careful examination of English and American authorities, he had found no case where the point had been decided either way. Judge Story,

strongly impressed as he was with the natural equity of the plaintiff's claim, declared himself unwilling to lead the way in making such a precedent as Chancellor Walworth had been unable to find. He examined the Roman law, the Spanish law, and the Scotch law, and in all these systems he found the question left beyond dispute; and after a postponement of the case and a mature deliberation, he came to the conclusion that the plaintiff was entitled to the full value of his improvements. His language in his final opinion is emphatic: "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, *as a doctrine of equity*, that so far as an innocent purchaser for a valuable consideration without notice of any infirmity in his title has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation." (2 Story R. 607.)

This case of *Bright v. Boyd* is not, it is true, in all respects the same with the one now under consideration. There is a difference between the two cases, and perhaps an essential one; but the only point of difference there is serves to place the case we have under consideration on less debatable ground. In that case, as in this, the sale and purchase was in good faith on both sides, but turned out to be void by reason of a noncompliance with the provision of the statute law; but, in that case, the occupant was plaintiff in equity, and desired compensation for improvements which he had in good faith made; in this case, the defendant asks for the purchase money, which has become, as it were, incorporated in the land by paying off a lien on it which the true owner was bound to pay. The owner insists on having the land and the money both. Now, by the common law, the maxim



was, "*cujus est solum, ejus est usque ad cælum*," and there was at least some plausibility, though no substantial equity, in the claim of the owner to the improvements as well as the land. It might have been urged that the true owner, if ignorant of his title and not aware of the improvements which the actual occupant was putting on the land, ought not to pay for improvements which he had not directly or indirectly authorized, and which might not at all suit his wants or his fancy. But such an argument could not be used in the case now before us. The purchase money has gone to extinguish a mortgage which the owner was bound to extinguish before he could get the land. It was not a matter of taste or fancy. The debt was a lien on the land, and that lien could only be removed by paying off the debt. There is no escape from the equity here, unless the plea should avail that defendant was a stranger, a volunteer, one who paid a debt without being asked, and who therefore upon legal principles shall not by such an act of folly be allowed to make himself a creditor of another person's debtor. We will examine this plea presently.

In the case of *Bright v. Boyd*, Judge Story said: "There is still another broad principle of the Roman law which is applicable to the present case. It is, that where a *bona fide* possessor or purchaser of real estate pays money to discharge *any existing encumbrance or charge upon the estate*, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. Now in the present case it can not be overlooked that the lands of the testator, now in controversy, were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale by a noncompliance with one of the prerequisites. It was not therefore, in a just sense, a tortious sale; and the proceeds thereof paid by the purchaser have gone to discharge the debts of the testator; and so far, the lands in the hands of the defendant have been relieved from a charge to which they were

liable by law ; so that he is now enjoying the lands free from a charge which, in conscience and equity he, and he only, and not the purchaser, ought to bear. *To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuitry of action to get back the money from the administrator, and thus subject the lands to a new sale, or at least in equity to the old charge.* I confess myself to be unwilling to resort to such a circuitry in order to do justice, where, upon the principle of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are, *ex æquo et bono*, in the hands of the present defendant, clearly liable."

I have transcribed this strong and decided view of Judge Story in the case of *Bright v. Boyd*, because, meeting in every respect the question we have to decide here, and applying *mutatis mutandis* to the precise facts of the case, we shall at least be relieved from any imputation of rashness or innovation if we follow the precedent made by so distinguished a jurist. And now Judge Story's doctrine, in *Bright v. Boyd*, has been made statute law in Missouri, whatever doubts may have existed hitherto of its right to a place among the principles of equity law. (R. C. 1855, p. 694.)

But the principle, apart from its undoubted and undeniable prevalence in the civil law and the codes which have grown out of this system of jurisprudence throughout continental Europe, does not, as an established principle of American equity law, rest upon the single authority of Judge Story. In *Hudgins v. Hudgins' executor*, 6 Gratton, 320, the court of appeals of Virginia applied the same principle to a case essentially like the present. In that case, there had been a proceeding against an executor to subject the land of his testator to the payment of a debt, and a decree was made for a sale of the land, and commissioners were appointed to make the sale and convey the land. The title acquired under the sale of the commissioners was held

to be void against the devisees under the will, but, as the purchase money had been applied to the payment of the testator's debts, which by the will were a lien on the land, the court would not permit the devisees to disaffirm the sale without paying back the purchase money. The equity in this case was administered by substituting the purchaser to the rights of the creditors.

It is immaterial under what form the equity in such cases is administered; whether under the name of compensation, as it was done in the case of *Bright v. Boyd*; or under the name of substitution, as in the case of *Hudgins v. Hudgins*; or, as it is sometimes more conveniently effected, by reviving the encumbrance, which the purchase money has extinguished, and permitting it to be used as a shield against a recovery at law. (*Peltz v. Clark*, 5 Peters, 482.)

In the case of *Howard v. North*, 5 Texas, 315, the principle was applied to sheriff's sales. There the sale and deed were held totally void, but the court would not allow the debtor or defendant in the execution to get back the land from the purchaser at the void sale without reimbursing him for the amount paid as purchase money, and which went to discharge the judgment which was a lien on the land. The doctrine of substitution was resorted to by the court to effect the object in view here, but the amount of it was that the purchaser was not compelled to restore the property until equity was done to him. This principle, thus applied to sheriff's sales, is recognized and acted on in Kentucky in numerous cases, and is there applied, not only to cases where the conveyance is ineffective, but to cases where the title of the defendant in the execution fails. The case of *McLaughlin's Adm'r v. Daniel*, 8 Dana, 182, is a case of this kind. The courts of Kentucky and South Carolina (*Bently v. Long*, 1 Stroth. Eq. 43) will give a purchaser at sheriff's sale, who loses his property by paramount title, a redress against the defendant in the execution for the amount paid on his purchase, which has gone to discharge the defendant's debts, by substituting him in the place of the creditor. In

our state, where the doctrine of *caveat emptor* has been maintained with strictness in its application to judicial sales, it may be that the courts would not be at liberty to go to the extent of the Kentucky and South Carolina cases, though recent legislation here, as well as recent decisions of this court, show a tendency to the same equitable doctrines. (R. C. 1855, p. 967; *Magwire v. Marks*, 28 Mo. 196; *Heath v. Daggett*, 21 Mo. 69.) In these cases of failure of title in the defendant in the execution and consequent failure of title in the purchaser at the sheriff's sale, the Kentucky courts base the equitable rights of the purchaser, not upon his knowledge or ignorance of the condition of the title, but upon the ground that the purchaser has discharged a judgment against the estate or debtor, for which the one or the other stood chargeable, by a purchase of property made under the process of the law, and therefore has the equitable right to be reimbursed out of the estate or property of the debtor. The purchaser, in such cases, might be called a volunteer or a stranger with as much propriety as the purchaser here could be, for he gets no title, either because the execution debtor has none, or because the process used to transfer it was illegal and void. The case of *Peltz and others v. Clark*, 5 Peters, 482, although unlike the present in the essential particular that the sale in that case was a valid one, shows that a purchaser, under the circumstances of this case, could hardly be regarded as a volunteer, so as to exclude him from the right of substitution, or the right to use a mortgage, which his money had satisfied, as a protection *pro tanto* against the ejectment.

In Louisiana, the courts have not hesitated, but disposed of this question as one too plain for argument under the laws of that state. In *Dufour v. Campané*, 11 Martin, 615, there was an irregular sale, just as there was in this case, and the title of the purchaser failed, not by reason of any want of title in the person from whom he supposed himself to be buying, but because of some informality in the conveyance or the proceedings which led to it. The court say,

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in a few words: "Nothing could be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

This is all indeed which could be or need be said upon the subject. "Nothing could be more unjust," we may repeat, than to permit a person to sell a tract of land and take the purchase money, and then, because the sale happens to be informal and void, to allow him, or, which is the same thing, his heir, to recover back the land and keep the money. Any code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect or a very inequitable one. We think that, upon well established principles of equity law, the owner of the land should, if he wishes to get it back, repay the purchase money, which he has received, or which he will receive if he gets the land. This may be done upon the compensation doctrine of courts of equity, with which, as it is settled on all hands, it is not inconsistent, if we regard the claim of the owner under such circumstances, as the Roman law treated it, as a case of fraud or ill-faith. But whether this equity be administered under the name of compensation or by substituting the purchaser in the place of the creditors whose debts he has paid, or by giving him the benefit of the mortgage which his money has paid off, is not material. The answer put in by the defendant should not have been stricken out, and, in order that the answer may be reinstated and the case may be tried upon these equitable principles, the judgment is reversed and the case will be remanded. Judge Ewing concurs.

SCOTT, Judge, dissenting. This was an action of ejectment brought by the heirs of C. C. Vallé against the defendants to recover the possession of land of which their ancestor died seized. The land in controversy was sold, by the administration of Vallé's estate, under a proceeding for the sale of real estate for the payment of debts. The land was mortgaged for the security of the debt for the payment of which it was

sold. The defendants became the purchasers of the land for a large sum, but on account of the irregularity of the proceedings had for the sale of it, no title passed to them by the deed of the administration. In this suit against the defendants to recover possession of the land, they set up these facts in an answer, and pray that they may be subrogated to the rights of the creditor for whose benefit the proceedings were taken to have the land sold, and whose debt was satisfied with the money paid by them.

I am not aware of any principle on which the defence set up by the defendants can be sustained. Cases similar to that under consideration have frequently occurred. If relief such as is sought here had been warranted by law instances of it would have been numerous, as we must be satisfied from our observation that like cases are of frequent occurrence. The magnitude of the sum involved may startle, but it can not affect the law. The distinction between powers and trusts or estates is a broad one. The administrator by our law is vested with no title to the land of his intestate. On his death it descends to his heirs. The administrator has nothing but a power; and, if he would affect the land, that power must be executed in pursuance to the terms of the statute by which it is conferred. There is no difference between this case and that of a sale by a sheriff. If a sheriff's deed proves invalid or ineffectual to convey a title, I know no instance in which a purchaser under it has been relieved. But how far is this new equity to be carried? The cases cited would lead us to grant it on a failure of title to property purchased at a sheriff's sale. Is it to be granted when there is no title by reason of irregularities in the proceedings to condemn the land, or to a defect in the instrument of conveyance, and to a failure of title to property purchased at a sheriff's or administrator's sale? The sanctioning of this defence may work changes in our system which no one can foresee. Certainly it will be the means of giving relief in a great many cases, in which it has been the sense of the profession that no relief was afforded by the



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law. Not that they were insensible to the hardship of particular cases, but because they knew that the hardship of particular cases was compensated by the advantages resulting from fixed general principles. No man is wiser than the law ; and miserable is that system of jurisprudence under which the rights of litigants depend on the notions of right or wrong entertained by any man or set of men. In the old books there is a great deal of learning, and many cases in which the question was involved whether a devise to an executor for the payment of debts was an estate in the land or a mere power to sell. If this doctrine of subrogation had any application in cases of a mere power to sell, how useless would have been much of that learning. If the purchaser under the power was subrogated to the rights of the creditors the motive to litigation in many cases would have been taken away, and the distinction between powers and trusts would have been measurably broken down.

The defendants are volunteers and strangers in relation to the plaintiffs. No man can make another his debtor without his consent. Nor can a man pay a debt of another without his authority and claim it of him. This is an important principle necessary to be preserved, and it is one which has had its influence in all cases in which it has been involved. In my opinion, the judgment ought to be affirmed.



HAMMOND'S ADMINISTRATRIX, Respondent, v. CADWALLADER,  
Respondent.

1. An agreement to purchase land at a sheriff's sale and to hold it in trust for another is within the third section of the statute of frauds ; it must be in writing.

*Appeal from Jefferson Circuit Court.*

The petition in this case sets forth substantially that John Hammond, plaintiff's intestate, became one of the securities of Eli Cadwallader on his bond as guardian of certain minor

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children ; that said Eli died indebted as guardian to said minors in about the sum of \$283.72, and did not leave personal property enough to pay his debts ; that all the real estate he owned was a certain tract of one hundred and sixty acres ; that this land was encumbered with a mortgage in favor of defendant Isaac Cadwallader, which plaintiff is informed was actually satisfied but was not released of record ; that one Johnston qualified as executor of said estate and obtained an order from the county court for the sale of said real estate for the payment of the debts of said Eli, specifying among others the indebtedness of said Eli to his ward ; that said executor duly advertised said land for sale ; that before the sale defendant came to said Johnston pretending that said mortgage was not satisfied and persuaded said Johnston as executor to confess a judgment for \$263.82 as a balance due on said mortgage from said Eli ; that on this judgment a special writ of execution issued ; that John Hammond, being security for Eli as aforesaid and seeing that it was likely he would have to pay said wards the amounts due from Eli, took measures to secure himself ; that he called upon defendant on the subject, and they entered into an agreement that defendant should buy the land aforesaid at his sale under the judgment of confession aforesaid in trust for the said Isaac (defendant) and said Hammond ; that said Isaac and said Hammond should each pay one-half of the costs of sale, and that said Isaac should retain the land until he could find a private purchaser ; that out of the proceeds of sale said Isaac was to pay or to retain enough to satisfy the amount of his judgment, and the balance he was to give to said Hammond to apply to the indebtedness of said Eli to his wards for which said Hammond was security ; that according to this agreement said Isaac bought said land at said sale in trust for himself and said Hammond, who paid his half of the expense of said sale to said Isaac ; that Hammond died ; that judgments were recovered against his administratrix in behalf of said wards for \$387, which plaintiff paid ; that said Isaac, defendant, sold said land for \$600 ;

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that said mortgage was paid off in the lifetime of Eli Cadwallader. The plaintiff prays that the defendant may be made to account for the proceeds of the sale of said land held in trust, and for judgment for the amount paid by plaintiff for said Eli Cadwallader on his bond as guardian.

It appeared in evidence that there was an oral agreement such as that charged in the petition entered into between the defendant Isaac Cadwallader and John Hammond, plaintiffs' intestate. The court instructed the jury that "if the defendant agreed with Hammond that, if he would not bid or interfere with him in the purchase of the land, he would buy the land and sell it, and after paying his own debt from the proceeds, and a small balance to B. Johnston, the administrator of Eli, he would apply the balance to liquidate the liability of Hammond as security of Eli Cadwallader, they would find for the plaintiff said balance with interest from the time of sale."

The court refused the following instruction asked by defendant: "If the alleged promise of Isaac Cadwallader was merely verbal, the jury will find for the defendants. A verbal promise in reference to the conveyance or holding land in trust could not be enforced. If the jury find the promise was not reduced to writing and was not to be performed within one year, they will find for defendant."

The jury found for plaintiff.

*Fletcher*, for appellant.

I. The alleged promise was within the statute of frauds. There is no allegation of fraud on the part of Isaac Cadwallader. (See generally 10 Watts, 320; 1 Watts & Ser. 376; 9 Watts & S. 66; 4 W. & S. 150; 2 Watts, 327; 9 Watts, 42; 15 Wend. 650; 16 Verm. 500; 1 Hoff. 95; 2 Johns. Ch. 405; Harring. Ch. 12; 7 Ind. 308; 3 A. K. Marsh. 947; Meigs, 390; 2 Paige, 238; 2 Ash. 482; 3 Sumn. 460; 4 Johns. 422; 12 Johns. 290; Willis on Trustees, 28; Coxe Ch. C. 15.)

*Noell*, for respondent.

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I. The interest that Hammond had in making the land bring a sum sufficient to pay his liabilities, and the foregoing of his right to bid it up to that point, is a sufficient consideration to support the promise to apply the proceeds as stipulated.- (27 Penn. 180.) The statute of frauds is not applicable to this class of trusts. This trust is raised by implication of law, and is founded upon the fact that the party asserting the trust had an interest in the subject matter of it prior to his agreement. That interest he yielded in the form it then stood in order that the party to whom he yielded it might use the subject matter of the trust to the mutual advantage of both parties. It would be a fraud were Isaac Cadwallader allowed to repudiate so much of the agreement as enured to the benefit of the other party. The instruction asked was properly refused. The court correctly declared the law in the instruction given. (27 Ala. 461; 13 Texas, 187; 16 Ill. 113; 2 Snead, 395; 12 Mo. 30; 6 Mo. 171; 20 Mo. 296.)

NAPTON, Judge, delivered the opinion of the court.

The circumstances of this case are materially different from those of *Rose v. Bates*, 12 Mo. 30. That case proceeded altogether upon the ground of fraud, and it is one of a class of cases in which implied trusts, arising out of fraud, have been enforced notwithstanding the statute which required them to be in writing. The case of *Brown v. Dyrenger*, 1 Rawle, 413; *McCulloch v. Cowhe*, 5 W. & S. 431; *Lees v. Nuttall*, 1 Russell & Mylne, 53; *Kisler v. Kisler*, 2 Watts, 427, and *Schmidt v. Gatewood*, 2 Rich. Eq. 162, proceed upon the same ground. Where transactions have been tainted with bad faith, there is a resulting trust by operation of law; but the simple violation of a parol contract does not constitute such a breach of faith; for if such was the law, the statute of frauds would be virtually repealed. It is not sufficient to call the transaction a fraud or a trust; there must be some artifice or trick employed to make it so, and a confidence reposed by one party in another on the faith of which

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something has been lost on one side and gained on the other. (Robertson v. Robertson, 9 Watts, 36; Haines v. O'Connor, 10 Watts, 320; Fox v. Heffner, 1 Serg. & R. 376; Lloyd v. Spillet, 2 Atk. 148.)

Here, it will be seen by reference to the bill of exceptions, no fiduciary relations existed between Hammond and Cadwallader. No evidence is offered to show that Hammond was a bidder at the sale of the land, or that he expected at any time to become a bidder; no evidence that Cadwallader made any representations at the sale, or authorized any by which the sale was affected, or by which Cadwallader was enabled to buy the land at an under-value; no proof that in fact the land did not sell for its full market price at the date of the sale. The case was a naked promise to buy the land in trust for the plaintiff, and such a trust not being in writing is clearly within the third section of our statute of frauds.

It will be observed that the bill in this case does not contain any allegation of fraud, and nothing is better settled than that, where a trust of this kind is sought to be enforced, fraud must be distinctly alleged and clearly proved. (Browne on Stat. of Frauds, 93, and cases cited.)

Moreover, if this was the object of the petition, the trial should have been by the court. But if this action is to be regarded, not so much as a suit to compel the specific performance of a trust, as for damages for the breach of a contract, it must fail under another section of the statute. The contract alleged and proved in this case must be considered as an agreement, upon certain contingencies, to pay the debt of another. Laying out of view all consideration of a trust in the land, the promise of defendant was simply to sell the land which he was about to purchase at the sheriff's sale, and apply the proceeds—after the payment of a small sum to Johnston, his brother executor, and the extinction of his own mortgage debt—to the plaintiff's claim against the estate of Eli Cadwallader. This promise was clearly within the fifth section of the statute.

Judgment reversed. The other judges concur.

PRICE, Appellant, v. HART *et al.*, Respondents.

1. Where delivery of possession of land in case of a parol contract of sale has unequivocal reference to such contract and is under and by virtue of it, this will constitute such part performance thereof as will take the case out of the statute of frauds.
2. Where a deed of a married woman is invalid by reason of a defective acknowledgment, she may ratify and confirm the same after becoming discoverer; a mere parol adoption would not be sufficient; it would be within the statute of frauds.

*Appeal from Monroe Circuit Court.*

This was a suit commenced in the year 1855 by Miriam Price against the defendants as the heirs of Mrs. Mahala Collins. The facts of the case are briefly as follows: Mr. and Mrs. Collins, in 1853, sold certain lands belonging to Mrs. Collins to the plaintiff Miriam Price. They executed a deed of conveyance dated February 24, 1853, in favor of plaintiff; who was admitted immediately into possession. She gave her notes for the purchase money. Mr. Collins soon after died. The deed executed by Mr. and Mrs. Collins was ineffectual by reason of a defective acknowledgment on the part of the wife. The defect was not discovered until after the death of Mr. Collins. There was evidence showing that in 1854, after the death of her husband, Mrs. Collins assented to the sale, expressed her entire satisfaction with it if the money could be secured to her own children, and promised to execute a deed to Mrs. Price. Mrs. Collins died in 1855 before the institution of this suit. After her death the purchase money due was paid to her administrator. The court decreed against the plaintiff on the ground that the contract being in writing was within the statute of frauds.

*Carr*, for appellant.

I. The deed of Mrs. Collins, though defectively acknowledged, is a sufficient note in writing within the statute of frauds. She adopted this deed after the death of her husband, and it became a sufficient memorandum or note in



writing. (10 Mo. 263 ; 15 Mo. 369.) The delivery of possession, making lasting improvements, and the payment of the purchase money, are sufficient to entitle the plaintiff to a decree of title. (15 Mo. 369 ; 25 Mo. 63 ; 23 Mo. 423 ; 21 Mo. 331 ; 19 Ala. 481 ; Browne on Stat. of Frauds, 482.)

NAPTON, Judge, delivered the opinion of the court.

There are difficulties in allowing Mrs. Collins' conversation with the plaintiff in 1854 to set up the deed, executed in 1853, as a sufficient memorandum in writing within the statute of frauds. That deed, not having been acknowledged according to law, had no validity as a deed against Mrs. Collins, and, as a contract, could not bind her, as she was at the time of its execution *feme covert*. Although a nullity in the law, it had however a physical existence ; and as it contained a distinct account of the sale of the land, a minute description of the land itself and a specification of the terms of sale, it might very well have been adopted, or ratified, by a subsequent agreement, if that subsequent agreement was in the form required by the law. In such case it is obvious that the binding force of the contract is in the subsequent agreement and not in the deed, and the agreement must therefore be in writing. If the deed can be adopted or set up by a mere parol declaration, made by Mrs. Collins after the removal of her disability of coverture, it would seem to let in all the evils which the statute was designed to guard against.

The case does not, however, in our opinion, turn upon this point ; for, conceding that there was no memorandum in writing, there is still ample proof to authorize a decree for specific performance of the agreement.

After the death of Collins, and after the mistake in the acknowledgment of the deed was discovered, the proof is uncontradicted that Mrs. Collins expressed her entire satisfaction that the sale should stand, and promised to execute another deed so soon as proper steps could be taken to secure the purchase money to her children. Mrs. Collins died

shortly after this conversation. The purchase money has been all paid to her administrator; and the plaintiff, who took possession of the land in 1853 immediately upon the execution of the deed, has been in possession ever since and made improvements on the place.

The circuit court seems to have dismissed the bill upon the ground that the possession of the plaintiffs was anterior to the contract sought to be enforced, and that the improvements made were not of such a character or of such value as of themselves to warrant a decree for specific performance.

It is well established that the delivery of possession of a tract of land, to form the groundwork of a decree for title, where the contract is wholly parol, must be in pursuance of the alleged contract. The principle itself is self-evident, but its application has been chiefly illustrated in two classes of cases. The first is where the party is in possession as tenant and attempts to set up a new lease or an absolute purchase. Here the relation of landlord and tenant exists at the time of the alleged contract, and the circumstance of the tenant's continuing in possession amounts to nothing. So where the relation between the parties is that of father and son, the possession of the latter admits of a similar explanation, and by no means necessarily leads to an inference that the land has been given or sold to the son. (*Eckert v. Eckert*, 3 Penn. 332.) But where the parties are strangers, as in the case now under consideration, the case is different. As was said by the Master of the Rolls, in *Morphell v. Jones*, 1 Swanst. 181, "the admission into possession having unequivocal reference to contract has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms."

It is impossible to distinguish the contract consummated by the supposed conveyance in 1853 and the parol agree-

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ment of Mrs. Collins in 1854, so far as a delivery of possession under the contract is concerned. The latter parol agreement may be considered as relating back in time to the former, or as amounting to a second delivery of possession at the date of the second agreement. To all intents and purposes, so far as the question of possession or the time of its being taken is concerned, they are one and the same. The facts, as stated in the finding of the court, or as more fully detailed in the bill of exceptions, show, beyond all doubt, that the possession of the plaintiff was under and by virtue of the contract of sale now sought to be enforced.

Judge Ewing concurring, the judgment is reversed and the cause remanded. Judge Scott absent.

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KING *et al.*, Respondents, v. BLENNERHASSETT *et al.*, Appellants.

1. A., being indicted for the murder of B., employed C. as attorney-at-law to defend him. As compensation for the services to be rendered, A. conveyed to C. a tract of land. C., after rendering some service as attorney, died, and D. was employed as attorney to defend A. As compensation for professional services rendered, A. conveyed to D. the same land previously conveyed to C. *Held*, that there was no equity in favor of D. that would entitle him to have the conveyance to C. set aside and the title vested in himself in whole or in part.

*Appeal from Jefferson Circuit Court.*

This was an action by Robert A. King and Edmond A. Nickerson against the administratrix and heirs of R. S. Blennerhassett, deceased. The plaintiffs in their petition seek to have a certain deed of conveyance made by Nelson Cross to said R. S. Blennerhassett set aside and the title to the land embraced in said deed vested in plaintiffs. The facts substantially are as follows: One Nelson Cross was indicted for murder by the grand jury of Jefferson county. He employed R. S. Blennerhassett as counsel to defend him. Mr.

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Blennerhassett agreed to attend to the case until it should be finally disposed of, and to take in full compensation for his services a conveyance of a certain tract of land containing about forty acres. Cross made a conveyance of said tract to Blennerhassett. Blennerhassett rendered some services as counsel, examining into the facts, and applying for and securing a change of venue, &c., but died before the cause came on for trial. When the cause came on for trial, Cross employed the plaintiffs as counsel to defend him. For their services he conveyed to them the same land previously conveyed to Blennerhassett. The plaintiffs offered to pay to the defendants such sum as the court should ascertain to be a reasonable compensation for the services rendered by Blennerhassett before his death. The above are the facts as set forth in the petition and made out by the evidence.

The court set aside the deed to Blennerhassett and decreed that the title be vested in plaintiffs upon their paying to defendants seventy-five dollars and costs of suit.

*C. C. Simmons*, for appellants.

I. The plaintiffs have totally failed to present a case which entitles them to a standing in a court of equity. (1 Young & Coll. 481; Sto. Eq. § 1040; Sto. on Contr. § 376; 22 Mo. 370; Chitt. on Contr. 743; 3 Rand. 504; 6 Conn. 458.)

*King & Nickerson*, for respondents.

I. The consideration of the deed failed by reason of Blennerhassett's death. The court very properly set aside the deed upon making compensation for the services which he had performed. Whatever equity Cross had enured to plaintiffs.

SCOTT, Judge, delivered the opinion of the court.

We do not see on what rules of law or principle of equity this suit can be maintained. The deed to Blennerhassett was an absolute and unconditional one. Had the land been conveyed for money and the purchase money been unpaid, the grantors would have had a lien on the land for the sum

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remaining due. Here the land was granted for services performed and to be performed. If those who conveyed the land had any recourse against Blennerhassett for his failure to perform the services stipulated, it would be an action against his representatives for damages. There is no rule of equity, that we are aware of, that would create a lien on the land for the payment of those damages. The subsequent deed, then, to the plaintiffs conveyed no interest in the land to them, as there was no interest in the grantors to convey. The deed, under the most favorable aspect, could only have operated as an assignment of the right of action against Blennerhassett's estate to the plaintiffs. It is not necessary to determine now whether it had that effect or not, as we do not deem it important.

The petition is not for the specific performance of the contract with Blennerhassett, nor yet to set aside the conveyance for a total or partial failure of consideration; in either of which views the defendants would have a right to retain the land on making good the consideration of the deed. The right of the plaintiffs to a decree is based solely on the conveyance of the grantors, who had previously conveyed to Blennerhassett.

It may be observed that all the grantors who joined in the deed to Blennerhassett did not, as appears from the deed as set out in the bill of exceptions, unite in the deed to the plaintiff. How, then, would they be entitled to recover the entire lot relying on their deed alone? This point was not raised in the court below, nor do we base our judgment upon it. The motion in arrest of judgment should have been sustained. Judgment reversed; the other judges concur.

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SALMONS' ADM'RS, Respondents, v. DAVIS *et al.*, Appellants.

1. One S. died in Kentucky in 1826. No administration in form was had upon his estate, but his widow and heirs made a division of his property, and a certain female slave named Milly was, with other property, assigned to the widow. About ten years after the death of her said husband the widow

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removed to the state of Missouri, bringing with her said slave Milly and her children. She died in 1855, and by her will disposed of said Milly and her children. Letters of administration were afterwards taken out upon the estate of S. *Held*, that the administrators of S. were proper parties plaintiff in a suit brought for the possession of said slaves in behalf of the representatives of said S.

2. The possession of a tenant for life is not adverse to the reversioner or remainderman; and he can not, by his acts and declarations, make his possession adverse so as to enable him to invoke the statute of limitations.
3. A husband dying, his widow and heirs made a division of his estate, including slaves, among them. The widow afterwards dying, the administrators of the husband instituted suit against persons claiming under the widow for the possession of certain slaves that had been assigned to the widow. *Held*, that a bond executed by the heirs at the time of the division and by which they bound themselves to abide by the division, but which was not signed by the widow, though read over to her and not objected to, was admissible in evidence as part of the *res gestæ*, in behalf of the administrators, to show that the assignment was made to the widow as dower and not absolutely.
4. Declarations of a person in possession of personal property as dowress for life only, can not be received in evidence to elevate her estate into an absolute one.

*Appeal from Pike Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Broadhead and Wells*, for appellants.

I. By the law of Kentucky at the death of Salmons, slaves descended to the heirs, as real estate. The title, therefore, vested in the heirs, and the administrators could acquire no title. The county court of Lincoln county had no authority to grant letters on the estate of Salmons, he never having resided or owned any property in this state. The court admitted illegal evidence, to-wit, the declarations of J. K. Salmons and others, heirs of Joel Salmons, contained in the deposition of Williams. The bond of the heirs was not admissible in evidence. It was not executed by the widow. It did not bind the widow and was never intended to do so. The declarations made by Mrs. Salmons as to her absolute title to Milly were improperly excluded. These declarations were competent to show the nature of her possession. The error of the court was in assuming that it was proven that



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Eve Salmons took a life estate only. The court erred in refusing the instructions asked.

*Henderson and W. Porter*, for respondents.

I. The articles of agreement were properly admitted in evidence. The declarations of the widow were properly excluded. (21 Mo. 522; 24 Mo. 221; 27 Mo. 220.) The statute of limitations is not applicable to the present case. (Angell on Lim. 181; 5 B. & Ald. 204; 12 Wheat. 129; 2 Mart. 422.) The statute can not run against an administrator until the grant of letters. (19 Mo. 467; 26 Mo. 291.) The court properly excluded the declarations of some of the heirs of Joel Salmons; so the declarations of Nathan Salmons, one of the administrators. The court properly refused the instructions asked. The suit was properly brought in the name of the administrators. (1 Marsh. 14; 1 Monr. 255; 6 Monr. 139; 1 J. J. Marsh. 16; 2 Bibb, 188; 2 J. J. Marsh. 203; 1 Kentucky Stat. p. 666, § 41.) It was no case for the application of the statute of limitations. There was no cause of action until the death of Mrs. Salmons. (Angell on Lim. 185; 5 B. & Ald. 204; 23 Mo. 344; 12 Wheat. 129.) The slaves were received as dower. Mrs. Salmons had only a life estate. The instructions given were correct. (21 Pick. 88, 80; 4 Ala. 166; 24 Mo. 399; 1 Dana, 340; Story, Confl. 429, 439; 9 Wheat. 571; 5 Pet. 518; 20 Johns. 265; 1 Mo. 726; 1 Williams on Executors, 267; 14 Peters, 32; 2 Phill. Ev. 550; 8 Wheat. 671; see 2 Mo. 48; 1 Harr. 337; 2 Bibb, 89; 1 A. K. Marsh. 10; 3 Litt. 180; 5 Cranch, 358; 27 Mo. 421.)

NAPTON, Judge, delivered the opinion of the court.

One of the principal questions in this case is whether the administrator of Joel Salmons or his distributees should have brought this action.

Salmons died in Kentucky in 1826. No administration in form was had upon his estate, but his widow and children (who were all of age but one) divided out his property, and

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the mother of the slaves now sued for, with other property, was assigned to the widow as her share of the estate. The theory of the action is that the slave was received as dower. However that may have been, the widow brought the slave Milly and her children from Kentucky about ten years after the death of her husband, and died here, shortly before this suit was instituted, in possession of the slaves. She undertook to dispose of them by a will, and her executors are accordingly the defendants in this suit, maintaining that the title of Mrs. Salmons to the slave Milly was absolute; and the plaintiff, representing the interests of the personal distributees of Joel Salmons, maintaining that the title of Mrs. Salmons was only for life, and that on her death the slaves vested in him as administrator of Joel Salmons. The question is, taking the plaintiff's view of the facts to be true, can the administrator, under the circumstances, maintain the action, or must the heirs of Joel Salmons bring the action in their name? The question only affects the form of the proceeding, for if the plaintiff prevails as administrator, he will recover merely as a trustee for the distributees.

It is well settled both in Kentucky and Virginia, where the law declares slaves to be real estate for some purposes, that they do not, in cases of intestacy, descend like land directly to the heirs, but go to the administrator as assets. Without the assent of the administrator, the title of the heir is not complete, and he can not maintain an action for them against a third person. After the passage of the act of 1800 in Kentucky, (2 Littell, 374,) slaves devised were no longer considered assets in the hands of the executors, but were held to pass, like land, directly to the devisee. But where there was no will, notwithstanding the statute declared them to be real estate, slaves, just as other personal property, passed upon the death of their owner into the hands of his administrator, and he alone could sue for them. (Woodyard's heirs v. Threlkeld, 1 A. K. Marsh. 14; Irons v. Luckey, *ib.* 54.)

There is no doubt, therefore, that the administrator is the

proper person to sue for slaves belonging to the estate of his decedent in ordinary cases, and where the property has never been administered on and handed over to the persons entitled to it after the payment of all claims against the estate.

Where there is a particular estate in a chattel and a remainder over, a delivery to the owner of the particular estate may be considered as a delivery to the person who has the remainder. Upon the death of the tenant for life in such cases, the title to the property is vested in the person having the remainder, and he alone is the proper person to bring an action for its recovery. As where a person dies, leaving slaves to A. for life, with remainder to B. absolutely; upon the death of A., to whom the executor or administrator of the devisor has delivered them, B. may maintain his action. The property has passed from the estate, and the administrator has nothing more to do with it.

But where a life estate is created by will or by law, and no remainder is designated, the reversion, as the remainder is then called, falls back into the assets of the original estate, and the administrator, in such cases, is the proper person to sue. Such may be regarded as the character of the present case, where slaves have been assigned as dower, which is a life interest only, and the reversion on the death of the dowress is in the estate of the husband. The administrator of that estate, and not the heirs or distributees, may well sue, considering the property as falling back into the mass of assets. This course will not only be more convenient, but in some cases it may be important to the rights of the distributees, who may have been unequally advanced in former distributions, and who may, through the intervention of this administration, have these inequalities corrected. Whether, under the circumstances of the present case, such as the death of Salmons' intestate more than thirty years ago in Kentucky, and the acquiescence of all parties in the possession of the negroes in controversy by Mrs. Salmons as dower, the consent of the administrator of Salmons might not be presumed, and an action be maintained by the heirs, is not

the question here. The question is, not whether the heirs might not under certain circumstances sue, but whether in this case the administrator could; and our opinion is, that, under the circumstances of this case, the suit was properly brought by the administrator.

The statute of limitations appears to have no bearing on this case, although some instructions were asked, and some evidence was offered, having reference to a title under this statute. (A person having a life estate in property can not, by his acts or declarations, set up pretensions to an absolute estate, so as to make his possession an adverse one to the reversioner or remainderman.) The reason of this is that there is no right of action in the reversioner until the particular estate has determined, and the possession of the tenant is entirely consistent with the title of the reversioner. In fact the latter concedes the existence of the former, and whatever the tenant for life may do or say about his title can be of no consequence to the reversioner; for, whether true or false, the latter can not disturb the life tenant during the admitted duration of his tenancy. It is impossible, therefore, for the tenant for life to make his possession an adverse one to the claim of one who has the remainder or reversion. It is not like the case of a trustee and a *cestui que trust*. The trustee may disclaim his trust and hold adversely to his *cestui que trust* as well as all others. The *cestui que trust*, unless laboring under some of the disabilities recognized by the statute and provided for, may sue the trustee at any time; and therefore if an adverse possession continues long enough, it will protect the trustee, notwithstanding the general principle of equity law that no length of time will bar a trust. This general maxim is applicable only to cases where the relation of trustee and *cestui que trust* continue and is recognized; for when the trustee disavows his trust openly, and maintains a position adverse to his *cestui que trust*, as he may do, he has the same benefit from the statute of limitations which all others have. But the case of tenancy for life is different. There is no one to sue, no matter how

often or how openly and loudly such tenant may claim to be absolute proprietor; for the person in remainder or reversion concedes the right of possession for life and can not therefore disturb it. The case, therefore, did not require any instructions based upon the statute of limitations.

If Mrs. Salmons took the slaves as her dower or as tenant for life, her possession could not be made adverse to the persons in remainder or reversion; and if Mrs. Salmons, as was contended on the part of the defendant, took an absolute estate, then the statute of limitations was out of the question.

The question of fact, upon which this case turned and upon which instructions from the court were given, was whether Mrs. Salmons took the slave Milly, the ancestress of the slaves sued for, as her dower and as a tenant for life, or whether, by virtue of the arrangement which took place between her and the heirs after the death of her husband, she acquired an absolute title to them. It appears that shortly after the death of Joel Salmons, his children paid off the debts of the estate, and having selected persons to appraise the property, divided it among themselves, after assigning to the widow the slave Milly and some other property. It is immaterial whether this division was binding upon the heirs or not; it was satisfactory to them and was satisfactory to the widow. It was made more than thirty years before this suit was brought, and has been acquiesced in ever since. The paper which preserved the evidence of this division was signed by all the children and was in the form of a penal bond with conditions. It was not signed by the widow, but was read over to her and was not objected to. This paper was given in evidence on the trial notwithstanding the objections of the defendants. We think the paper was admissible as a part of the *res gestæ*. It was contemporaneous with and explanatory of the whole transaction.

It will be observed that by the law of Kentucky, as it was at the time of this transaction, a widow's dower in the slaves of her husband could not under any circumstances by the



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mere force of the law exceed a life estate. (1 Litt. Ch. 293.) There was no provision, as there is in our state, for her taking any proportion of the slaves absolutely. We do not say, that, by consent of the heirs, such an interest could not be yielded to the widow; but the legal presumption, in the absence of any agreement, would be, that slaves taken as dower would be taken only for life. The instruction, therefore, which the court gave the jury on this point, was certainly quite as favorable to the defendants as the law would permit. The court did not give to the plaintiff the benefit of a presumption which the law gave them in the absence of any agreement to the contrary.

Upon another point, also, the instructions of the court were more favorable to the defendants than the law warranted. By the laws of Kentucky, in 1826, a nuncupative will of slaves was not allowed. Such at least is the construction of the act of 1800, which directed slaves to pass by will as land, given by the courts of that state. (*McCans & wife v. Board's heirs*, 1 Dana, 341.)

The exclusion of the declaration of Mrs. Salmons, tending to show her claim of an absolute title in the slaves, was proper. (*Watson v. Bissell*, 27 Mo. 223.)

The declarations or statements of Robert Salmons, John K. Salmons, and E. Chasten, distributees of Joel Salmons, deceased, were properly excluded. These persons were not parties, and were competent witnesses. Some of them did testify in the case, but no foundation was laid for contradicting their evidence, or impeaching their veracity, by declarations inconsistent with their statements in court.

The declaration of Nathan Salmons, the administrator, was also properly excluded, because it was made long before he was administrator; and as to matters which occurred previous to his taking out letters, he was fully competent to testify, although a party to the suit.

In relation to portions of the deposition of N. N. Williams, admitted on behalf of plaintiffs, which are objected to as



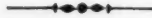
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hearsay and incompetent; it is sufficient to say that no exception was taken to those depositions at the trial.

Judge Ewing concurring, judgment is affirmed. Judge Scott absent.



PEERS, Respondent, v. DAVIS' ADMINISTRATORS, Appellants.

1. Where a contract is reduced to writing, the written instrument is presumed to contain the whole contract; parol evidence is inadmissible to contradict or vary its terms.
2. False representations made by a vendor in the sale of a chattel, to amount to a fraud upon the purchaser, must be known to be false when made, and made with intent to deceive.
3. Where a new trial is sought on the ground of surprise by the exclusion of depositions of witnesses residing more than forty miles from the place of trial, the affidavit accompanying the motion for a new trial should set forth the testimony contained in the depositions, or at least the substance of it, so that it could be determined by the court whether it is material or not.
4. Surprise, in its legal acceptation, denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence could not have afforded protection. The fact that witnesses, whose depositions are taken, reside within forty miles of the place, is a fact of which the party taking such depositions can inform himself by ordinary diligence; if it be not known, the want of knowledge is to be attributed to his own *laches*, and surprise thus produced can not be ground for a new trial.

*Appeal from St. François Circuit Court.*

This was an application to the county court for the allowance of a demand against the estate of Luke Davis. The foundation of the demand on a promissory note for one hundred dollars given by said Davis to one Milton Sebastian. This note was given in part consideration of the sale of a female slave named Katy, and was assigned to plaintiff. The bill of sale executed by said Sebastian, so far as it is necessary to set forth the same, is as follows: "Know all men by these presents, that I, Milton Sebastian, of, &c., for and in consideration of the sum of two hundred dollars, to me in hand paid by Luke Davis, of, &c., the receipt whereof, &c.,

do by these presents bargain, sell, transfer, assign and deliver unto the said Luke Davis, his executors, &c., a negro woman, slave for life, called and known by the name of Katty, now about the age of fifty years old, together with all my right, title, interest, claim and demand of, in and to the said negro woman slave: To have and to hold, &c.; and the said Milton Sebastian for himself, his executors and administrators, does hereby covenant to and with the said Luke Davis, his executors, &c., that said negro woman is a slave for life. Given, &c. [Signed] Milton Sebastian [seal]."

The evidence tended to show that at the time of the sale the negro woman was between seventy and eighty years old, and was quite worthless as a slave. The defendants offered Koen, one of the defendants, as a witness to testify, as stated in the bill of exceptions, "as to matters occurring anterior to the death of his intestate, to show the representations made by Mr. Sebastian at the time he sold the negro woman." The court refused to permit him to testify, on the ground of incompetence. Certain depositions were excluded on the ground that the witnesses resided within forty miles of the place of trial. Several witnesses were introduced, who, as stated in the bill of exceptions, "severally testified to a conversation in which Luke Davis, in a grocery, about a year ago, stated that he told Sebastian, at the time the bill of sale was being written, to put the age of the negro at about fifty or fifty-five years, and not to make her too damned old, as he might want to sell her again."

The court, at its own instance, gave the following instructions: "1. If the jury find from the evidence in the cause that the note sued on was given in consideration of the purchase of the negro woman from Milton Sebastian, and at the time of the sale Sebastian made false and fraudulent representations in regard to the age, qualities or bodily capacity of said slave, whereby the purchaser Luke Davis was deluded into the purchase; and if they further find that in consequence of the age, qualities, or physical condition, the said negro woman was worthless and of no value, they will find a

verdict for the defendants. 2. But the jury are further instructed that the want of value of the slave in consequence of her age and physical infirmity is not of itself sufficient to invalidate the sale, unless accompanied with proof of false representations by Sebastian at the time of the sale, by which the said Davis was deceived and deluded into the purchase."

The court refused the following instructions asked by defendants: "1. If the jury find from the evidence that the note read in evidence was given in consideration of the purchase of a negro woman from Milton Sebastian, and that said Sebastian falsely represented to said Davis at the time of the sale that said negro woman was many years younger than she was in fact, and that he also falsely represented to said Davis the qualities and capacity of said negro much better and greater than they were in fact, which representations were the main inducements to the trade, and that the negro woman was in fact worthless, diseased and many years older than represented by said Sebastian, then the plaintiff can not recover in this action. 2. The statement in the bill of sale by Sebastian, in describing the negro slave, that she was fifty years of age, amounts to a representation on his part that she was of that age, or at least not greatly above that age, and if such statement was untrue it is in law a fraud upon Davis."

The jury found for plaintiff.

*Noell*, for appellants.

I. The court erred in excluding the testimony of Hardy Koen. He is not incompetent as a party. (R. C. 1855, tit. Witnesses; 20 Mo. 17; 23 Mo. 65.) The court erred in refusing the second instruction asked. The statement in the bill of sale amounted to a representation. The second instruction given was erroneous. It is not the law that there must have been false representations. If the property was wholly worthless from disease such as rheumatism, and Sebastian sold the negro and failed to disclose the fact, then

the defendant would have been entitled to relief. No man is allowed to take something for nothing. There must be a consideration for every promise. The court erred in refusing a new trial on the ground of surprise. The depositions were taken because the witnesses, it was believed, resided more than forty miles from the place of trial. It seems they lacked a mile or two of the distance. The defendants were surprised by the action of the court.

*Beal*, for respondent.

I. The note sued on is for value received, negotiable and payable without defalcation or discount, and not subject to any set-off or any other defence as against the assignee. (20 Mo. 354.) The court properly excluded Hardy Koen as a witness. The court properly refused to allow the depositions to be read. The affidavit of defendants of surprise does not help the defendants' manifest negligence. It was their business to know whether their witnesses resided at such distance from the place of trial as would entitle them to read their depositions. The instructions asked were properly refused. (27 Mo. 21, 55.) The instructions given put the case fairly before the jury. There was no evidence of any misrepresentations made by Sebastian at or before the sale. (7 Mo. 514.) Statements made after the assignment of the note by Sebastian were not competent evidence. (6 Mo. 48; 18 Mo. 405; 27 Mo. 440.)

EWING, Judge, delivered the opinion of the court.

The exceptions to the ruling of the court below, insisted on here, are in excluding the evidence of Koen, administrator of Davis, and one of the defendants; refusing the second instruction asked by appellant, and overruling motion for a new trial.

Upon the first point it does not very clearly appear what was proposed to be proved by the witness Koen. It was stated generally to be representations made by Sebastian, the vendor of the slave in controversy, at the time he sold her

to Davis. If these representations referred to the transaction of sale, or any thing relating to the contents of the bill of sale, the evidence was incompetent, because the instrument itself was the best evidence of the agreement of the parties, and it could not be contradicted or varied by parol evidence. Where the contract is in writing, the instrument is presumed to contain the whole contract. But the facts sought to be proved by these representations are so vaguely and indefinitely indicated, that upon this ground, if for no other reason, we might well conclude that no error was committed in rejecting the evidence. In such cases this court can not say there is error, unless the facts, which the excluded testimony is intended to prove, are so indicated as to enable this court to determine whether they are admissible, and, if admissible, whether they are material upon this point. Therefore we are of opinion there was no error, for the reason stated, irrespective of the question of the competency of the witness, about which we express no opinion.

The second instruction asked by the appellant was erroneous and properly refused. In the first place, the bill of sale in evidence contains a warranty that the negro sold was a slave for life and no other; and it is not pretended that there is any warranty as to the slave's age. As to her age there is simply a representation, and that is made in such guarded and cautious terms and with such qualification as clearly to show the vendor's intention to incur no liability on that score, and to suggest the rule *caveat emptor* as the one which should govern the transaction in this respect. But the error of the instruction is in asserting the proposition that a representation by a vendor in the sale of property that is untrue is a fraud upon the purchaser. This is a *non sequitur*. However representations by the vendor *not known* to be true may be regarded in morals, they are not such as subject him to legal liability, unless known to be false. Representations made in the sale of chattels, although untrue in fact, may be made with no design to deceive, or commit a



fraud upon the vendor, and may be perfectly consistent with honest intentions and good motives in the transaction.

If the purchaser of the slave were suing for damages upon the ground which is set up as a defence in this action, it would not suffice to allege simply that the seller made false representations as to the slave's age, or as to any other matter which might be the subject of the alleged misrepresentations. Such facts would constitute no cause of action, and there would be no recovery unless there was an allegation of fraud.

In order to make a representation a ground for an action of deceit or fraud, it must be shown that the representation was known to be false, and that it was made with an intent to deceive, though the known falsity of a representation would be strong evidence of a purpose to practice a fraud. Where there is no warranty there can be no recovery for false representations made in the course of the sale unless they were known to be such by the vendor. In all such cases the ground of deceit is disposed of when the existence of the defect is found by the jury to have been unknown to the vendor. This doctrine is applicable only to the action or the defence of a deceit in the sale of a chattel. (*Jolliffe v. Collins*, 21 Mo. 242.)

If the slave, owing to her advanced age and bodily infirmities, was of little value, and the purchaser had a hard bargain, yet he chose to rely upon his own knowledge in making the purchase and not to exact a warranty except as to the single particular already mentioned. As to the age of the slave, which is represented in the bill of sale as being about fifty-five years, the evidence clearly shows that there was no cause of complaint on that ground; for at the time of the sale and when the bill of sale was being written, several witnesses testify that the decedent, Davis, told the vendor, Sebastian, to represent the age as the instrument expresses it, and "not to make her too old"—giving as a reason that he might wish to sell her again.



The remaining point is the refusal of the new trial. The bill of exceptions shows that certain depositions offered by appellants were excluded for the reason that the deponents resided within forty miles of the place of trial. In support of the motion the appellants filed their affidavit alleging that they were taken by surprise by the exclusion of the depositions; that they were of opinion that the witnesses resided more than forty miles from Farmington; and went into the trial in full confidence that such was the fact, and that they would have the benefit of said depositions. It further alleges that they expect to prove false and fraudulent representations made by Sebastian in regard to the age, qualities and physical condition of the slave.

The affidavit contains no averment of merits, or that the verdict is unjust. Moreover, the ground relied upon is insufficient in omitting to state in the affidavit what the depositions contained. The evidence should have been set out, or at least the substance of it, so that this court could determine whether it was material. It might have been immaterial; if so, there would have been no cause for a new trial. It is not enough that the party himself states the facts he supposes the excluded evidence will tend to prove. But had the evidence appeared in the affidavit, the facts alleged as the ground for a new trial, it is conceived, would not have warranted it. Surprise in its legal acceptation, it is said, denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection. Where the witnesses resided, whether more than forty miles from the place of holding court, was a fact of which the party could readily have informed himself by ordinary diligence; and that it was not known is to be attributed to his own *laches*; and surprise produced by the *laches* of the party is never a good cause for a new trial. (3 Graham & Wat. New Trials, 949.)

The other judges concurring, the judgment will be affirmed.

## JAMISON, Plaintiff in Error, v. GLASCOCK, Defendant in Error.

1. A person standing in a fiduciary relation to another will not be permitted, in the management of the property committed to his charge, to derive an advantage at the expense of his *cestui que trust*.
2. This rule applies to the case where a person, in whose favor another has confessed a judgment, accepts a power of attorney constituting him an agent of the latter to dispose of certain lots and parcels of land, and then has an execution issued upon the judgment by confession and levied upon those lots, and purchases the same himself at the sheriff's sale.

*Error to Ralls Circuit Court.*

This was a suit in the nature of a bill for the redemption of mortgaged property. The plaintiff, John Jamison, prays an account and a decree for a reconveyance of the property alleged to have been acquired and held in trust. The facts as they appeared in evidence are substantially as follows: John Jamison, plaintiff in this suit, was collector of the county of Ralls. French Glascock, the defendant, was one of the securities on the official bond of said Jamison. Jamison being a defaulter, Glascock assumed the indebtedness of Jamison to the county, amounting to \$608.82, and gave his own bond, with securities, to the county for that sum, the county releasing Jamison. This bond or note of Glascock was dated August 27, 1849. On the 28th of August, 1849, Jamison confessed a judgment in the Ralls circuit court in favor of Glascock for \$608.82. The written statement made by Jamison upon which judgment by confession was rendered stated the indebtedness to be "for so much money by the said Glascock assumed for me to the county of Ralls, and paid off by his bond and security, which the said county accepted, and discharged the judgment held by said county against me." The bond given to Ralls county has been fully paid and satisfied—Glascock paying one hundred dollars on August 30, 1849, two hundred dollars on January 1, 1850—and Jamison paying the balance, three hundred and twenty-

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six dollars, on June 6, 1850. Jamison went to Texas in the year 1850. Before he left, he executed a power of attorney dated June 12, 1850, to the defendant Glascock and others, constituting them attorneys in fact to collect and receive all debts, dues and demands due to said Jamison, and empowering them or any one of them to sell and convey certain real estate, therein described, situate in Ralls and Marion counties. On the 16th of September, 1850, at the instance of said Glascock, an execution was issued upon the judgment confessed in the Ralls circuit court. This execution was directed to the sheriff of Marion county. This execution was levied on the 8th of February, 1851, upon certain lots belonging to said Jamison in the city of Hannibal. These lots were embraced within the power of attorney given by Jamison to Glascock and others. At the sheriff's sale, March 12, 1851, Glascock became the purchaser of said lots, seven in number, for the sum of one hundred and seventy-five dollars, of which one hundred and sixty-five dollars and eighty-eight cents were credited on the judgment. In the year 1850, one Losey, under a judgment before a justice of the peace in favor of said Losey and against said Jamison, had levied upon five of said lots, and had bid off the same for three dollars and fifty-five cents. On the 21st of September, 1850, Losey, upon receiving the amount of his judgment from Glascock, relinquished his bid. This relinquishment was made to Jamison. Glascock stated to Losey that he was Jamison's agent. One Abner Smith had a mortgage upon the lots in Hannibal for two hundred and six dollars and sixty cents. This mortgage Glascock paid off October 7, 1851, and it was released by entry of record. The transactions had by Smith with Glascock were had with him, as Smith testified, in the capacity of agent of Jamison. Glascock had sold all but one of said lots.

The plaintiff asked the court to declare the law of the case as follows: "1. If it appears from the evidence in the cause that the plaintiff (Jamison) gave to the defendant (Glascock) the judgment by confession given in evidence for

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six hundred and eight dollars and eighty-two cents, to indemnify the said defendant as to his liability for that amount as security for said plaintiff in his bond as collector of the revenue in and for Ralls county, Missouri; and that it was then understood and agreed by and between said plaintiff and said defendant that said plaintiff, intending to leave the state soon thereafter, should give the defendant a power of attorney authorizing him to settle up plaintiff's business and sell the real estate now in question; and that in pursuance thereof plaintiff gave defendant the power of attorney read in evidence, and defendant accepted the agency and trust created thereby, and that said defendant, instead of selling and disposing of said lots under said power of attorney, sued out an execution on his said judgment and caused the same to be levied on and sold under said judgment and execution, and bought them in at greatly less than their value—all after plaintiff had left the state, in the absence of plaintiff and without any notice to him—then the finding should be for the plaintiff. 2. If the defendant [plaintiff] confessed the said judgment in plaintiff's [defendant's] favor in consequence of an agreement between the plaintiff and the defendant to the effect that the judgment should be an indemnity to the defendant as to his liability as plaintiff's security in the bond as collector, and for no other purpose, then the said judgment was in the nature of a mortgage, and the lots purchased under the same and bought in by defendant are subject to redemption by the plaintiff, and the finding should be for the plaintiff."

The court refused so to instruct or declare. The plaintiff thereupon took a nonsuit, with leave, &c.

*Porter & Harrison*, for plaintiff in error.

I. Glascock being appointed and having assumed to act as agent for Jamison, in 1850, in taking care of and selling the lots in question for Jamison, he can not be permitted to so use his judgment by confession as to sacrifice his principal's interests to his own advantage. Standing as he did in

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a fiduciary relation to said Jamison, all the benefits of the redemption from Losey's execution and sale of said lots, after the reimbursement of his advances and payments for Jamison, enure to Jamison. The court should have declared the law to be as assumed in plaintiff's first instruction. (See Story on Ag. § 210, 215; 1 Story Eq. 321; Jeremy Eq. 395; Hill on Trustees, 157, 535.) The fact that Glascock was a judgment creditor made him none the less an agent and trustee. The fact of the parties assuming the fiduciary relation towards each other, which they did in 1850, imported an agreement that Glascock should pursue that course which would be most promotive of and least prejudicial to Jamison's interests. Equity will imply such an agreement as in point of fact was undoubtedly made in this case.

*Pratt & McCabe*, for defendant in error.

I. The court properly refused to declare the law as prayed. The judgment by confession was not to secure against a contingent liability, but to satisfy, so far as the plaintiff's property would go, a debt which the plaintiff owed the defendant. In the power of attorney no allusion is made to the debt, which plaintiff says was secured by the confession of judgment. The judgment under which the sales were made was totally disconnected with the objects which Jamison had in view when he created the pretended agency, and as a consequence no trust could arise. The confession of judgment gave Glascock a lien on the real estate of plaintiff, and even if a subsequent arrangement had been made between the parties, the lien of his judgment could not have been disturbed, unless the evidence of the agreement was of as high a nature as the record of the judgment. The evidence is altogether insufficient to clothe the land with any kind of trust. Where land is purchased at a judicial sale, it is not competent to show by parol that the purchaser agreed with the former owner to permit the latter to redeem. (8 S. & R. 492.) Glascock never was in a position to have taken advantage of the plaintiff. He did obtain no advantage.



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The entire property of Jamison was insufficient to pay Glascock's debt. (9 Wend. 36.) Any declarations that Glascock may have made as to his agency would not raise a trust which equity would enforce. (5 Wend. 389.) There was no fraud.

SCOTT, Judge, delivered the opinion of the court.

This case turns on the propriety of the instructions asked by the plaintiff and refused by the court.

If the substantial facts, whose existence is assumed by the first instruction asked by the plaintiff, are proved, (and in the hearing of this writ of error we must take them to be true,) we do not see how the conduct of the defendant can be reconciled to those principles which have been established by courts of equity for the government of the conduct of trustees. The office of a trustee is one of confidence, and he is watched with the greatest vigilance lest he should abuse the confidence reposed in him. As he voluntarily assumes the trust, the law will not permit him, in the management of it, to make to himself any profit or advantage at the expense of the *cestui que trust*. He can not become the purchaser of the trust property but at the option of those for whom he acts, as he thereby unites in himself the opposing characters of the seller and purchaser—the interest of the former of which is to sell for the highest price that can be obtained, while that of the latter is to buy for the least sum at which the property can be acquired. In such cases equity does not examine for fraud on the part of the trustee who attempts to purchase the subject of the trust, but takes away the temptation, by holding him incapable of making a purchase which shall bind those for whom he is entrusted; and it gives them the option to vacate or affirm the purchase of their trustee. The rule prevents a conflict between the interests and the duty of the trustee, and shuts out a difficult and embarrassing inquiry into his motives. It is necessary for the security of those whose property is held in trust, and promotes integrity in the dealing of the trustee with the



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property that has been entrusted to his care and management.

The defendant having a confession of judgment against the plaintiff, by law he would have a right to enforce the judgment by execution, and to become a purchaser at the sale under it. But there was nothing to prevent the defendant from divesting himself of this right, if he thought proper to do so. Having it in his power to collect his judgment at any time, as both he and the plaintiff knew, what could have been his motive in acting under a power of attorney which authorized him to sell the very lots which were afterwards sold under the judgment? The power of attorney was executed after the confession of the judgment. What hopes must have been excited in the plaintiff by the defendant accepting the power of attorney authorizing him to sell the land? It must have lulled his apprehensions respecting the sacrifice of his property under the judgment which had been confessed. How naturally would the thought occur to the plaintiff that the defendant would not use his judgment, as he had a power of attorney to sell. Could the plaintiff have supposed that, after this, the judgment would have been enforced, until he at least had notice of a failure to raise money under the power of attorney? It may be said that the defendant had a right to issue the execution and to become a purchaser under it. But would not the acceptance of the power of attorney be an abandonment of this right? After consenting to sell the lots under a power of attorney, and thus placing himself in a fiduciary relation to them which prevented his becoming a purchaser, he could not use his judgment in such a way as to relieve himself from the incapacity to which he had voluntarily subjected himself. As his rights as a creditor were in conflict with his duties as an agent, the former must yield to the latter. By taking upon himself the office of agent, he waived his right as a creditor so far that he could not become a purchaser.

The case of *Rogers v. Rogers*, in *Hopkins' Ch. R.* 515, is very similar to that before us. There, a person by his will

appointed an executor. Between the time of making the will and the death of the testator, the person named as executor became a judgment creditor of the testator, and after his death qualified as executor. The testator left debts unpaid and an estate consisting of personal and real property. The personal estate was insufficient to pay the debts. The executor caused all the lands of the testator to be sold under an execution issued upon the judgment held by himself as a creditor, and he became a purchaser. The sale and purchase were vacated at the instance of other persons interested in the estate of the testator. The chancellor remarked: "If the executor had not accepted the trust, he would have been at full liberty to pursue all his remedies for the satisfaction of his judgment; and if loss to others had followed the exercise of his rights as a creditor, he would not have been responsible. When he accepted a trust which imposed on him the duty of taking every legal and prudent measure to pay the debts of his testator from the personal and real estate, he was no longer at liberty to exert his rights as a creditor in opposition to his duties as executor. He continued a creditor, but he relinquished any right of a creditor which might interfere with his duty as a trustee. Having accepted the trust, he could not, in the character of creditor, do any act which should subvert or impair the interests of those for whom he was trustee."

The circumstance that the trustee was an executor constitutes no real difference between the case cited and that now under consideration. The executor, knowing that he was a judgment creditor, voluntarily took upon himself the office of executor. There was no legal compulsion on him to accept the duty of executing the testator's will. Thus willingly making himself a trustee, the executor was held to have relinquished his right to become a purchaser at a sale of the property with which he was entrusted. So here, although the judgment creditor might have enforced his judgment and have become a purchaser at a sale under it, yet, voluntarily clothing himself with a trust in relation to the

property which disqualified him from acquiring it at a sale, he must be regarded as having renounced that right. The rule of equity applicable to this subject extends not only to trustees strictly so called, but also to persons standing in a similar situation,—such as executors dealing with the estate of their testator; or committees with the estate of the lunatic; or commissioners, assignees, or solicitors of a bankrupt or insolvent estate purchasing any portion of the assets; or the agent of the trustee who becomes the purchaser of the trust property; or a governor of a charity taking a lease of the lands of a charity; or an agent for buying or selling property buying or selling for or to himself. In none of these instances will the transactions be suffered to prevail against the equitable rights of the injured parties. (Hill on Trustees, 223.)

We deem that most of the grounds taken by the defendant in support of the judgment have been answered in what has been already said. We do not see what the statute of frauds has to do with this controversy. If the case is as stated in the first refused instruction, then, if it is within the statute of frauds, so are all the cases in which the trustee becomes a purchaser of the trust fund; for this suit can be maintained on no other ground than that a trustee charged with a trust in relation to property has become the purchaser of that property.

Why does the defendant attempt here to explain the object of the power of attorney, after having so emphatically denied that he ever accepted any agency under it? He asserts here that the bulk of the plaintiff's property was in Ralls county. This may be probable, as he took a confession of judgment there, the lien of which we may suppose he thought would be a sufficient security for his debt; but this fact is not in the record. We may not know how the facts are in relation to this matter, but we know the lien was only such in the county in which the judgment was confessed. Assuming that the bulk of the property was in Ralls, the plaintiff asks why this suit was not brought for the lands in Ralls county.

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This inquiry implies that lands were sold in that county to pay the defendant's debts. But if the bulk of the property was there, why would he go to Marion county, where his judgment was no lien, and seize property to satisfy his debt, unless he would tell us that all the property in Ralls had been exhausted. If he would turn away from property in that county subject to his execution, and go into Marion in search of town lots, it would certainly be a circumstance against him. We do not know how this matter is, but we think it very singular that it was not fully explained in the court below.

We are of opinion that there was no error in refusing the second instruction, as there was no evidence to warrant it. Reversed and remanded; the other judges concur.



## HAHN'S ADMINISTRATOR, Respondent, v. SWEAZEAE, Appellant.

1. To warrant the reversal of a judgment on the ground of the admission of irrelevant testimony, it must appear that it was calculated to mislead the jury.
2. Remission of damages may be made by a plaintiff after a motion for a new trial has been overruled.

*Appeal from Bollinger Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Noell*, for appellant.

I. It was error to permit the witness to detail the statements of plaintiff made in reference to the marks and descriptions of the filly. The court should have given the instruction asked, excluding the evidence so far as it tends to prove title or identity. The court erred in refusing the second instruction asked. Where the scale is equally balanced by the evidence on both sides, the possession of property will be left where it is found. There was not a particle of evi-

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dence to sustain the verdict for damages. Nor does the remission of damages, after the motion for a new trial was overruled and exception taken, alter the case.

*Glover & Richardson*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action to recover the possession of a bay filly and damages for her detention commenced under the act of 1849, and in which the plaintiff recovered judgment.

On the trial, during the examination of one of the plaintiff's witnesses, he was asked by plaintiff to state what plaintiff said in the presence of defendant's family (the defendant being absent) when the plaintiff went to demand the filly. The defendant admitted a demand and objected to the evidence going to the jury, as he was not present. The court overruled the objection and the witness was permitted to state what was said by the plaintiff. The substance of the testimony was that the plaintiff described the filly by two unusual marks, both of which were on the mare in controversy, and declared that unless the filly he claimed had these marks she was not his property. After this testimony was heard by the jury, the court directed them that it was only evidence of a demand. After the evidence had been closed on both sides, the defendant asked the court to instruct the jury that the statement of the plaintiff tending to show title in himself to the filly and giving a description of her, is not evidence for the plaintiff to prove title or to prove the identity of the filly in controversy. This instruction was refused.

We can see no reason why the court permitted the evidence to go to the jury, nor why the instruction was refused. It is certainly, to say the least of it, a very unsatisfactory way of conducting a trial, to allow a witness to give illegal testimony, knowing at the time it will turn out so. Improper evidence will sometimes escape a witness, as it is not known what he will state, and the court will sometimes change its



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opinion upon reflection and strike out evidence when it has been received. But it is strange that a court would permit a witness to testify, when it is known that his testimony will be illegal. When the demand was admitted, there was no necessity for the witness proceeding any further in his statement. In truth, the evidence was inadmissible to establish a demand, as the defendant was not present. The court must have known that the object of the party was a sinister one; and why was he indulged? After the allowance of this evidence, under the circumstances, the court surely would not have erred had it given the instruction asked by the defendant.

Although the conduct of the court was such as might well have created dissatisfaction in the mind of the defendant, yet strictly we can not say that there was such error as, under all the circumstances, will warrant a reversal. The jury was verbally directed to disregard the improper evidence except on the point of a demand, and on looking at the evidence in the record we can not say that the hearing of the illegal evidence by the jury caused a prejudice to the defendant. The declaration of the plaintiff heard by the jurors was supported by the testimony of several witnesses in their description of the filly. They described her as the plaintiff did. We must suppose that the jury governed themselves by the direction of the court.

The case did not turn so much upon the equilibrium of evidence as upon the credibility of the witnesses. There is no doubt that when the evidence is of equal weight on both sides, in the minds of the jury, that they should leave the parties as they find them. When a plaintiff would take from another what is in his possession, he must produce evidence that would satisfy the mind that it would be right to do so. But as this case evidently turned on the credibility of the witnesses, as has been observed, we can not say that the defendant was prejudiced by the refusal of his second instruction, especially when we take into consideration those given for the other side.



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The remission of the damages during the term was in time, although it was not done until after the motion for a new trial had been overruled and exceptions taken.

Upon the whole, on looking through this record, we are not satisfied that the defendant would be benefited by a new trial. Affirmed; the other judges concur.



LEWIS, Plaintiff in Error, v. BOWEN'S ADMINISTRATOR, Defendant in Error.

1. No endorsement or written assignment of a promissory note is necessary to enable the holder thereof to maintain an action thereon in his own name.

*Error to Marion Circuit Court.*

S. S. Allen, for plaintiff in error.

Pratt & McCabe, for defendant in error.

EWING, Judge, delivered the opinion of the court.

This was a suit commenced in the county court of Marion county upon a note executed by William Bowen, deceased, to James Parker, and by him transferred by delivery merely to the plaintiff Lewis. Lewis had judgment in the county court, from which Bowen appealed to the circuit court. On the trial in the circuit court, the execution of the note having been duly proved, plaintiff offered it in evidence, which was rejected. He thereupon suffered a nonsuit, which he moved to set aside. The motion was overruled, and the cause is brought to this court by writ of error. The only point in the case is the refusal of the court to permit the note to be read in evidence, because there was no assignment in writing or endorsement.

Under the practice act now in force, which abolishes the distinctions in the forms of actions and requires suits to be prosecuted in the name of the real party in interest, no en-

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dorsement or assignment in writing is necessary to enable the holder of a promissory note to maintain an action in his own name. This point was decided in the case of *Boeka v. Nuella*, 28 Mo. 180. See also *Bennett v. Pound*, ib. 599.

The judgment will be reversed and the cause remanded; Judge Napton concurring. Judge Scott absent.

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LINVILLE *et al.*, Respondents, v. WELCH, Appellant.

1. What is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are admitted; where the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury.
2. If the residence of the endorser of a dishonored bill of exchange is unknown to the holder, inquiry should be made to ascertain his domicile or place of business.
3. A bill of exchange drawn in one state of the United States upon a person in another state is to be treated as a foreign bill of exchange; in case of dishonor, protest is necessary; it is not necessary, however, that the notice of dishonor should be accompanied by a copy of the protest. The notice may be a verbal one.
4. Presentment of a bill of exchange to the drawee must be made in a reasonable time. What time will be reasonable depends upon the circumstances of the case.

*Appeal from Adair Circuit Court.*

This was an action against the defendant as endorser of a bill of exchange for five hundred dollars, dated October 24, 1854, at Cincinnati, Ohio, and drawn by Ellis & Sturges in favor of defendant, Thomas Welch, upon the banking-house of Loker, Renick & Co., at St. Louis. The bill was endorsed by Welch to plaintiffs. From the notary's entry on the face of the bill and the protest it appeared that the bill or draft was protested for nonpayment on the 13th of December, 1854. On the day of the protest the notary sent notice of protest to Ellis & Sturges at Cincinnati, Ohio, and also sent notices to Welch, directed to Cincinnati, Ohio, and to St. Louis, Mo. It appeared that the plaintiffs sent the bill to

their agent at St. Louis, Mo., and he, on the 17th of November, 1854, presented it to Loker, Renick & Co., who refused to pay the same. The banking-house of Ellis & Sturges had failed November 7, 1854. The agent returned the bill or draft to the plaintiffs, who sent the same back to the agent to present again. He did so on the 13th of December, and the bill was protested on that day for nonpayment. There was no protest made upon the first refusal of payment. There was evidence that defendant had notice of the first refusal of payment.

The court, at the instance of the plaintiffs, gave the following instruction: "If the jury believe from the evidence in the cause that the bill was presented to Loker, Renick & Co. for payment in a reasonable time, and that payment was demanded and refused, and that the defendant was notified of the presentment and refusal to pay in a reasonable time, then they will find for the plaintiffs."

The court refused to give the instructions asked by defendant. The jury found for plaintiffs.

*Barrow & Platte and McCabe*, for appellant.

*Glover & Richardson*, for respondents.

I. The presentment of the draft was made in a reasonable time. Both a verbal and written notice was given. It was regularly protested. A verbal notice was sufficient. (Story on Bills, § 300; Chitty on Bills, 502; 3 Kent Com. 106.)

NAPTON, Judge, delivered the opinion of the court.

The instructions given by the court in this case were erroneous. What is due diligence in giving notice of dishonor of a bill of exchange is a question of law, when the facts are agreed on; and when the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury. (1 Peters, 583.)

Upon the facts disclosed in the bill of exceptions in this case, it is impossible for this court to pass upon the sufficiency of the notices attempted to be given by mail. So far

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as the evidence goes, it seems clear that notices put in the post-office at St. Louis, directed to the defendant at Cincinnati and at this place, were insufficient. There is no direct evidence to show where the defendant resided, or where his place of business was, but it may be inferred from the evidence that he lived in Edina. If so, and that fact was known to the plaintiffs or their agent here, notices directed to the defendant at Cincinnati or St. Louis were of course no notice at all. If the residence of the defendant was unknown to the plaintiffs or their agent here, inquiry should have been made to ascertain his true domicile or place of business. (Story on Bills, § 299.)

It appears to be the prevalent and settled opinion now, that a bill of exchange drawn in one state of the United States upon a person in another is to be treated as a foreign bill of exchange, upon the same principle, we may suppose, that the courts in England held a bill drawn in Scotland or Ireland upon a person in London to be a foreign bill, after the Union; (Buckner v. Findlay & Van Seer, 2 Peters, 589; Mahony v. Ashlin, 2 Barn. & Adolph. 589; 3 Kent Comm. 94;) and in all cases of foreign bills of exchange a protest is necessary. (Story, § 277.) But it is not necessary that the notice of the dishonor should be accompanied by a copy of the protest; it is sufficient for the notice to state that the bill has been protested, leaving the proof to be made at the trial, if the case is contested. (Story, § 302.) And the notice may be a verbal one made to the parties in person. (Story, § 300.)

In relation to the presentment to Loker, Renick & Co., the law requires this to be made in reasonable time, and what that will be must depend upon the circumstances of the case. That the presentation made in this case by Matthews, on the 13th December, was not within reasonable time, would seem to follow from the fact that a previous presentation had been made on the 17th November.

Judgment reversed and the case remanded. The other judges concur.

## BARLEY &amp; WIFE, Respondents, v. TIPTON, Appellant.

1. A justice of the peace rendered a judgment against A. and B. A. dying, an execution was issued and levied upon certain property as the property of B., and the constable sold the same. Previous to the issuing of the execution by the justice, A. had sold and conveyed said property to C. *Held*, in a suit by C. against the constable to recover damages for a wrongful levy, in which suit it was assumed that A. had title to the property at the time of his transfer to C., that the defendant was not in a position to make out a defence by showing that A. had transferred the property to C. with a view to defraud his creditors.
2. A constable who levies upon and sells property under an execution not directed to him and illegally in his hands, may be treated as a mere trespasser; the constable must derive his authority from the justice who rendered the judgment or his successor in office.

*Appeal from Montgomery Circuit Court.*

This was an action against the defendant, Jonathan Tipton, a constable of Monroe township, Lincoln county, to recover damages for an alleged wrongful levy upon certain hogs. The facts briefly are as follows: One Thomas Money, in January, 1849, executed a bill of sale, which was duly recorded, conveying certain hogs to his sister Catherine Money, afterwards married to David Barley and plaintiff in this suit. In June, 1849, on the day of, or the day after, the death of Thomas Money, one McKee obtained a judgment before John Reed, a justice of the peace of Hurricane township, Lincoln county, against Thomas Money and Anna Money. Execution was immediately issued against both defendants and certain hogs were levied upon and sold as the property of Anna Money. The hogs sold were a portion of those embraced in the above mentioned bill of sale to Catherine Money. The execution issued was directed to the constable of Hurricane township. This constable afterwards returned the execution not satisfied. The justice renewed the execution, and at the risk and request of the plaintiff authorized Joseph Sitton to execute and return the same. The execution afterwards, in some unexplained manner, came

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into the hands of Joseph Hardesty, a justice of the peace of Monroe township, in said county. He renewed the same for sixty days, and authorized Jonathan Tipton, the defendant, to execute and return the same. Tipton executed the writ as above stated. The court struck out that part of the answer in which the defendant attempted to justify the alleged trespass under the authority of the execution, and in which he set up that the bill of sale by Thomas Money to Catherine Money was executed in fraud of the rights of the creditors of Thomas Money.

The court instructed the jury as follows: "The bill of sale read in evidence passed the title to a lot of hogs to Catherine Money; and if the jury find that a portion of said hogs were taken by defendant, they will find for plaintiffs the value of the pork so taken."

There was a verdict for plaintiff.

*E. A. Lewis*, for appellant.

I. The instruction given was erroneous. It assumed too much and took the case out of the hands of the jury. There was no proof of title in Thomas Money when he executed the bill of sale to Catherine. Nor was his ownership admitted in the pleadings. The defendant levied on the hogs as the property of Anne Money. It should have been left to the jury to determine whether Thomas Money was the owner at the time of the execution of the bill of sale; whether, considering all the circumstances of the sale, it ever was completed even as between the parties.

II. The court erred in striking out of the defendant's answer the allegations touching the judgment and execution and defendant's acts as constable under the same, and the acts of Catherine Money pending the levy and sale which operated as an estoppel to her afterwards seeking to invalidate the official acts of the defendant. (Story on Ag. § 91; Story on Eq. § 192, 385; 6 Ad. & El. 474; 18 Barb. 435.) It does not appear from the constable that he derived his authority from a justice of the peace of a different township



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from that in which the judgment was rendered. The legal presumption is that the constable received the execution from the justice that rendered the judgment.

III. The court erred in rejecting the testimony offered to show that the bill of sale was designed as a mere blind to deceive creditors.

*Henderson* and *Hunt*, for respondents.

NAPTON, Judge, delivered the opinion of the court.

The main effort in this case, on the part of the defendant, the failure of which is complained of, was to get in his proofs of the fraudulent intentions of Thomas Money in making the bill of sale to his sister, the plaintiff. The difficulties in the way of such a defence as this appear to be insurmountable. The execution, which defendant had in his hands, was against Thomas Money and Anna Money; but Thomas Money was dead, and had been long before the execution was renewed. So far as Thomas Money was concerned, the paper was a nullity, and this property could not be reached in that way. If the execution is to be treated as a valid one against Anna Money, and a justification is attempted to be set up under it in that view, then the fraud of Thomas Money is foreign to the case; so that, in either view of the defence, no ground is laid for an attack upon the conveyance from Thomas Money to his sister, the plaintiff.

The instruction given by the court, that the bill of sale from Thomas to Catherine Money conveyed the title to the hogs levied on, was doubtless occasioned by the previous decisions of the court, not only in excluding all testimony tending to impeach this transaction for fraud, but all the documentary proof of a valid execution. The defendant was regarded in the light of a naked trespasser.

The instruction goes very far in taking from the jury all consideration of the title of Thomas Money, or of Anna Money, if she ever had any; but, under the circumstances and facts in evidence, we can not say that the instruction could possibly have injured the defendant.

There was no evidence to show title in Anna Money, the person against whom the execution could only have been directed or levied. There was no evidence offered in the case on either side to show that Anna Money had ever set up any claim to this property, or had ever exercised acts of ownership over it, or had ever been in possession of it; on the contrary, the title of Thomas Money previous to his transfer to his sister was not a controverted point in the case. Both sides conceded it; the plaintiff assumes it as the source of her title; and the defendant's evidence throughout was all based upon the same assumption, and was therefore aimed to establish that Thomas Money had transferred the title to plaintiff for the purpose of defrauding his creditors. For the purposes of this trial, therefore, it can not be said that the court committed an error in giving an instruction which disregarded and left out of view any hypothesis based upon a claim of title, or the existence of title, at any time in Anna Money. Had there been any controversy in this point, such an instruction might have been improper, and certainly would have been improper, were it not for another difficulty which the defendant had to encounter in his defence. The execution which the defendant had in his hands was issued originally by a justice of the peace of Hurricane township, and was directed to the constable of that township; whereas the defendant was constable of Monroe township, and it appeared upon the face of the execution that he had no authority to execute it. The execution seems to have been renewed, after its first return unsatisfied, by the justice who first issued it, and put into the hands of one Joseph W. Sitton. Then it appears to have fallen into the hands of a justice of Monroe township and by him put into the hands of defendant, who was constable of that township, to be executed. It should have appeared that the last named magistrate was the successor of the one who originally renewed it; but not only does this not appear positively, but the contrary is shown by the papers; for the successor of Reed, the first justice in Hurricane township, who issued

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execution, is the justice who certifies the papers, and he is a different person from the person who, as justice of Monroe township, undertakes to authorize the defendant to execute the writ.

So that, in every view of the case, the defendant stood before the court as a mere trespasser. The only defence which, under such circumstances, seemed to be available was, that the plaintiff had no title; but as he was not in a condition to dispute the validity of the transfer from Thomas Money to her, and offered no evidence to show that Anna Money ever had any title, and in fact conceded, by his attempted defence, that Thomas Money did have the title previous to his sale to the plaintiff, this ground was a very shadowy and narrow one, and was in truth utterly cut off by the mere proof of possession in the plaintiff. Judge Ewing concurring, judgment affirmed. Judge Scott absent.



ORRICK *et al.*, Defendants in Error, v. BOWER *et al.*, Plaintiffs in Error.

1. Where an administrator's deed conveying lands refers to the report of sales made by the administrator to the county court, such report, together with a plat of lots sold accompanying it, will be regarded as incorporated with the deed for purposes of construction and interpretation; they will be admissible in evidence to determine the boundaries of the land conveyed by the administrator's deed.
2. A call for quantity in a deed must yield to a more definite description by metes and bounds.

*Error to St. Charles Circuit Court.*

This was an action in the nature of an action of ejectment to recover possession of a piece of land containing one 62-100 acres. Both plaintiffs and defendants claim title under Nicholas Janis, deceased—the plaintiffs by virtue of deeds from the heirs of said Janis, and the defendants under a deed from the administrator of said Janis. The administrator in this deed recited an order of sale made by the county court

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of St. Charles county, the proceedings under this order, the report of the administrator to the court, and the approval thereof by the court. Accompanying this report was a plat of the lots sold. Lot eight, as marked out upon this plat, did not include the land in controversy, and contained three 97-100 acres only. This report and the accompanying plat were admitted in evidence against the objection of defendants. The defendants asked the court to "decide that if the estate of Janis, at the date of the administrator's sale, owned the land south of lot eight, then the deed will be extended south so as to include the quantity of five 59-100 acres mentioned in said deed; that the call in said deed for its southern boundary can not limit the quantity called for in said deed."

*C. Wells*, for plaintiffs in error.

I. The court erred in admitting the report of the administrator to limit the amount of land conveyed.

II. The court also erred in admitting the plat attached to the report. It conflicts both with the report and the deed.

III. The court erred in refusing the instruction asked.

*E. A. Lewis*, for defendants in error.

I. The administrator's report and the accompanying plat were properly admitted. (16 Mo. 124; 9 Mass. 161; 3 Binn. 455; 17 Mass. 207; 2 Ohio, N. S. 361; 21 Pick. 135; 14 Mass. 149; 9 Cranch, 173; 4 Wheat. 444; 37 Maine, 63.) The quantity expressed in the deed is to be taken as a mere estimate and not a part of the description; a discrepancy therein can not disturb the location of the boundary lines thus ascertained.

EWING, Judge, delivered the opinion of the court.

The first point that will be noticed is whether the court below erred in admitting as evidence the report of sale made by the administrator and the plat accompanying it. It is urged first, that the report could not be admitted to limit

the amount of land conveyed by the deed to defendants, because it is not referred to in the administrator's deed; and second, that the plat attached to the report was improperly admitted, because it conflicts with both the report and deed.

The report of a sale of real estate made by an administrator is the foundation of the title, and its approval by the court is his only authority for executing a conveyance; and when it is referred to in the deed, it thus becomes a part of it, and they are to be construed together as one instrument.

In this case, the statute on the subject of administration sales of real estate seems to have been duly complied with. The deed of the administrator shows that a full report of his proceedings was made to the county court, and that the same was duly approved. It is true, that there is no express reference in the deed to the plat; but the plat is referred to and made a part of the report, and thus becomes virtually a part of the deed, as much so as if it had been incorporated into the body of it.

The admissibility of the plat as evidence and its effect are different things, which seem to have been confounded in the second point made by counsel. If the plat, by reference in the deed, becomes a part of the latter, it is admissible for that reason irrespective of any supposed conflict that may appear between them. What its effect may be in this respect, or how far one may control the other in ascertaining the description of the land conveyed, is a question of interpretation, and not one of competency. In such cases, the writing referred to may or may not qualify the descriptive parts of the conveyance, and one may correct an erroneous description contained in the other, or even vary or add to as well as explain it.

But the objection is not well taken for another reason. The acceptance of the deed was an acceptance of the plat, which was a part of it; and the defendants, (plaintiffs in error,) are estopped from impeaching it. They claim title under the deed of the administrator, and set it up as a defence, alleging in their answer that the land in controversy was con-

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vayed thereby. If they have title to any part of the land conveyed by that deed, the report and its approval is the basis of it. The land claimed by the plaintiffs in error is described in the deed as lot number eight, which is a small part of a large survey, and is described in part by reference to the land of third persons, which is also similarly designated on the plat. The plat is thus made a necessary means of identifying the land, and of ascertaining its relative situation to other lands sold by the administrator according to the plat, and which are referred to in the deed as its boundaries; and the plaintiffs in error, in claiming under the deed, rely also upon the report and plat.

The question in this case is one of boundary, and it relates to the southern boundary of the land conveyed by the deed of the administrator. In the deed it is described as "all the right, title and interest which Nicholas Janis at the time of his death had in and to the real estate, being lot number eight of survey No. 159, bounded south by part of said survey; west by lots of Henry Bower, Jean Komepeter and Henry Dave; north by Charlesworth's farm; and east by commons; containing five and 59-100 acres." The deed from the heirs of Nicholas Janis to Orrick (defendant in error) describes the land thereby conveyed as "a tract of land lying northward of the city of St. Charles, and including part of survey No. 159, originally confirmed to Nicholas Janis under Antoine Janis, together with lands lying southwardly of and adjoining said survey; the tract hereby conveyed being bounded on the north by the lands sold by Arnold Krekel, administrator of the estate of Nicholas Janis, deceased, to Rice and Barwise and to H. Bower; on the east by lot claimed by Henry Beckman; south by lot of Lorenzo Holmes; and on the west by the St. Charles and Marais Croché macadamized road; and being all the land there lying contiguously which belonged to the estate of Nicholas Janis, deceased, and which the parties of the first part claim by inheritance or otherwise."

It is contended by the plaintiffs in error that the land in



controversy must be embraced in the deed to Rice and Barwise in order to make up the quantity therein stated to be conveyed; and that the southern boundary is so indefinite as to authorize an extension in that direction for that purpose. On the contrary, the defendants in error insist that no part of the land in dispute is included in lot number eight according to the deed and plat.

If the boundaries of the land designated as lot number eight can be ascertained from the deed with the report and plat, the quantity embraced within such boundaries, whether more or less than the quantity called for in the deed, passes thereby. Quantity becomes material only where the boundaries are uncertain or doubtful, and then it is entitled to consideration according to the circumstances of the particular case. It forms no part of the description of the land conveyed, where monuments or visible objects are called for as boundaries, but is mere matter of estimate. Therefore, if all the particulars of the description by metes and bounds do not concur in designating as lot eight a parcel of land which includes the one 59-100 acres in controversy, then it is no part of the land intended to be conveyed.

There is no difficulty in applying these rules satisfactorily to this case. It is evident, by comparing the deed and plat together, that to fix the southern boundary of lot eight where plaintiffs in error claim it should be, would be to derange the boundaries of the land and substitute another and different description. The call in the deed and plat for the western boundary is lots of Henry Bower, Jean Komepeter and Henry Dave; but if the southern boundary is extended as proposed, the western boundary would then be the lots of the persons named and the king's highway; and the northern boundary, instead of the call for Charlesworth's farm, would be that farm and the land of Henry Bower—thus giving an entirely different form to the land, and substituting other and different calls, and so varying the description as to include a parcel of land not designated by the plat or deed. If, instead of the call for the land of Bower, Komepeter and

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Dave as the western boundary, it had been designated by commencing at a point on the southern line of Charlesworth's farm, thence south to the south-east corner of the land of Bower, then it is evident that upon well established principles the purchaser would have been restricted to the quantity within the area thus bounded, although it may have been less than the deed called for, and for a like reason should he be restricted to the quantity within the area of which the lands of Bower, Komepeter and Dave forms the western boundary. In the one case, the beginning and terminating points are visible objects or monuments, definite and certain; in the other, it is a line coinciding with the eastern boundary of the lots of those persons, throughout its whole extent, which is equally definite. Hence the quantity called for in the deed must yield, as being a less certain criterion of the intention of the grantor to the more definite description of metes and bounds. Had the eastern and western lines of lot eight been described as extending from points on the Charlesworth farm south to points on the land of Janis so indefinite as not to be ascertainable with the requisite certainty, the quantity in such case might become material as descriptive of what land was intended to be conveyed; and the rule of interpretation insisted upon by counsel for plaintiff in error would apply.

Judge Napton concurring, the judgment will be affirmed. Judge Scott absent.



THE STATE, Respondent, v. CUSHING, Appellant.

1. It is improper to direct a jury in a criminal case to disregard the entire evidence of a witness, if they believe him false in any particular.
2. The courts should not, in instructing juries, comment upon the testimony.
3. It is not incumbent upon the State in a prosecution for murder, if there is a failure to prove that the mortal blow was struck with the weapon mentioned in the indictment, to prove what the weapon used was.

*Appeal from St. François Circuit Court.*

The following is a portion of the charge of the court to the jury: "Murder in the second degree differs from murder in the first degree more in the nature and quality of the evidence necessary in each degree than in the character of the constituent facts pertaining to each; for, in murder in the first degree the law requires that the deliberate purpose to take life or do some great bodily harm should be shown and established by the evidence, and by evidence alone; such evidence as of its own proper and natural weight establishes affirmatively the existence of such deliberate purpose to kill, &c.; whereas murder in the second degree may be made to appear from the fact of killing alone, the prisoner failing to explain by evidence on his part that it was done otherwise than with such deliberate intention, as that it was done in the heat of sudden and uncontrollable passion in lawful self-defence, or in some other less criminal manner. If, therefore, the evidence in the cause is of such character as of its own proper and natural force satisfies the minds of the jury that the prisoner did deliberately and purposely kill the deceased as charged, they will find him guilty of murder in the first degree. But if, on the contrary, the evidence does not thus satisfy the minds of the jury by its own proper force that the prisoner did thus deliberately and purposely kill the deceased as charged, then, in the absence of any extenuating evidence reducing the offence to some grade of manslaughter, or of its being a killing by accident, misfortune, or in justifiable self-defence, the jury will find the defendant guilty of murder in the second degree, and fix his punishment to imprisonment in the state penitentiary for a term not less than ten years."

The following is the fourth instruction asked by the defendant and refused: "4. The indictment in this case having alleged that the mortal blow was struck with a bottle or with some other weapon to the jury unknown, said allegation is not established unless it is proved that the mortal blow was

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struck with the bottle or by some other weapon. If the jury find it was not with the bottle, then it is incumbent on the State to prove what the other weapon was."

*Noell*, for appellant.

I. The State failed to prove the venue. The instructions given are erroneous. The instructions concerning murder in the second degree and concerning circumstantial evidence are erroneous. The instructions asked should have been given.

*Mauro*, (circuit attorney,) for the State.

NAPTON, Judge, delivered the opinion of the court.

An examination of the testimony in this case has satisfied us that if the jury committed any error in their verdict, it was an error in favor of the accused.

The instructions upon which the case was tried are substantially correct. The one chiefly complained of, concerning murder in the second degree, appears to conform to the views expressed by this court in the case of the State v. Phillips & Ross, 24 Mo. 488.)

The instructions asked by the defendant were, in our opinion, properly refused. The first is an instruction directing the jury to disregard the entire evidence of a witness, if they believe him false in any particular. Such instructions invade the province of the jury, whose business it is to determine the credibility of witnesses, and who are not to be hampered in exercising their judgment by any inflexible rules on the subject. The second instruction is a comment on the testimony, which, under our practice, is not permitted, and so is the third. The fourth is not law.

The proof of the venue in this case was a matter for the jury. (State v. Lamb, 28 Mo. 228.) The judgment is affirmed; the other judges concur.

## PARKER'S ADMINISTRATOR, Respondent, v. MOORE, Appellant.

1. The verdict of the jury should be responsive to the issues made by the pleadings.
2. Where an instrument in writing signed by a party is offered in evidence against him to prove facts recited therein, it will not, if otherwise relevant and competent, be rendered inadmissible by reason of an erasure upon it, whether material or not; that circumstance will be open to comment and for the consideration of the jury.

*Appeal from Ripley Circuit Court.*

The facts sufficiently appear in the opinion of the court.  
*Noell*, for appellant.

NAPTON, Judge, delivered the opinion of the court.

This was a suit on a note given by Moore to Parker in his lifetime for \$1,130, dated March 24, 1854. The plaintiff, who was Parker's administrator, declared on the note as upon a note given to himself. The defence set up in the answer was that the note was a mistake; that in its present form of a note to Parker alone it was for twice the amount it should have been, or it should have been drawn payable to Parker and Moore. The answer explains the circumstances under which the note was executed. It states that Parker and Moore were about engaging in partnership as merchants; that Parker advanced towards the concern \$1,242 and Moore \$112, and the note in question was given to make the advances of Parker and Moore equal; that as \$1,130 was the amount advanced by Parker over the sum advanced by Moore, and that the note was given for that sum, when it should, under these circumstances, have been given for half that sum.

Upon the trial of the case before a jury, the court excluded a paper, offered in evidence by the defendant, in the handwriting of Parker, and signed by both Parker and Moore, purporting to be articles of copartnership and explaining the amount of advances by each party, and stating that Moore

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was to give his note for \$1,130, that being the amount which Parker put into the concern over the sum paid in by Moore. This paper was excluded on account of an erasure or obliteration of the day of the month on which it purported to have been executed.

The verdict of the jury was that defendant executed the note to plaintiff, and that the amount of the note, both principal and interest, was yet due. The judgment of the court was for the plaintiff for the full amount of the note.

To say nothing of the variance between the note given in evidence and that described in the petition, the verdict of the jury is not responsive to any issue made in the case. The execution of the note sued on was not denied, nor was it pretended that any portion of it had been paid. The defence set up was that the note was a mistake, either in amount or in the omission of one payee. The verdict of the jury seems to be a special one, and it is, to say the least, equivocal in its terms. Every fact found by the jury may be true, and yet the defendant's answer may also be true and constitute a good defence to a portion of the note.

The paper offered by the defendant should have been submitted to the jury. Its execution was proved, and its contents were material and pertinent to the issue. The erasure or partial obliteration of the date was a circumstance which did not affect the competency of the paper as testimony. That circumstance was open to comment and was for the consideration of the jury. It does not seem that the erasure was material; but whether material or not, it would be evidence. This suit is not based upon this paper; the parties to it are not sought to be held liable upon it in this action. There is no question in this suit as to its validity or binding character. It is offered to explain the character of a note which seems to have resulted from the agreement of which this paper is a written memorandum, and as such it is evidence, whether a material erasure was on it or not. Besides, it does not appear, nor is there any thing to show, whether this obliteration was accidental or intentional; whether, if the



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latter, it was made by either of the parties to it, or by a stranger. These circumstances would be material in determining how far it was binding upon the parties to it; but whether it was binding or not, it was evidence collaterally to explain the transaction which has given rise to this action.

Judgment reversed and cause remanded. The other judges concur.

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KEITHLEY, Defendant in Error, v. MAY, Plaintiff in Error.

1. The discontinuance of an action as to one or more of several defendants in an action on a contract is not a matter entirely at the discretion of the plaintiff, and the courts should not allow it to be done where it will work injustice by depriving a party of a just defence to the action.
2. A. and B. were sued jointly on a promissory note. A. was served personally with process; B. by copy; but the sheriff returned both personally served. They not appearing at the return term, a judgment by default was rendered against both. Afterwards and during the term, the sheriff, upon leave given, amended his return, and it then appeared that B. was served by copy. B. moved the court to set aside the judgment by default, and set forth in his affidavit that he had a meritorious defence and its character. The court sustained the motion, and on motion of plaintiff dismissed the suit as to B. and rendered judgment by default against A. *Held*, that the court improperly exercised its discretion in permitting plaintiff to dismiss his action as to B.

*Error to St. Charles Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*S. S. & D. C. Woods*, for plaintiff in error.

*Woodson, Edwards & Randolph*, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

This case involves the question of the propriety of the conduct of the court below in permitting the plaintiff to dismiss his petition as to the defendant Robert May. Robert and Pinckney May were jointly sued on a promissory note. Pinckney was personally served with the writ, whilst Robert

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was served by leaving a copy. The sheriff made a return that both defendants had been personally served, and they not appearing on or before the second day of the return term, a judgment by default was taken against them. Afterwards during the term, on motion, leave was given to the sheriff to amend his return, and the amendment having been made, it then appeared that Robert May had not been personally served with process. The court thereupon, on motion of the plaintiff, (the judgment by default having been set aside,) permitted him to dismiss his petition as to the defendant Robert May, and entered a judgment against Pinckney May. Robert May, in an affidavit in support of his motion to set aside the judgment by default against him and for leave to plead, stated that he had a good defence; that the note sued on was executed to William Keithley, the father of the plaintiff; that one Thomas Ward sold and delivered to the defendant a note on the said William Keithley for three hundred dollars before the note sued on was assigned to the plaintiff. It was further stated that the assignment was fraudulent and that William Keithley was wholly insolvent.

From the foregoing statement of facts, it will be observed that this case is not one falling within the provisions of the nineteenth section of the fifth article of the practice act prescribing the circumstances under which a plaintiff may dismiss his petition as to some of the defendants. The defendant Robert May was regularly served with process, and appeared and desired to defend the action, but because he had been served in such a way as entitled him to have the trial of the cause postponed until the next term, the plaintiff, in order to prevent this, discontinued as to him and took a judgment against the other defendant.

As the court had no warrant in the statute law to support the course adopted, its action must look to the common law for principles by which it may be sustained. In actions of tort at common law the plaintiff could enter a *nolle prosequi* as to one or more of the defendants. Our statute makes

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all joint contracts several ; and, when several are sued jointly, allows a judgment against one or more of them, changing the common law in these respects. Notwithstanding these changes, we do not conceive that the discontinuance of the action as to some of the defendants in suits on contracts is a matter entirely at the discretion of the plaintiff, and the courts should not allow it to be done when the effect of such a course will be to deprive a party of a just defence to the action. In the case of *Brown v. Pearson*, 8 Mo. 159, it was held that the dismissing of the action as to some of the parties was a matter of practice resting in the discretion of the court. The same principle was maintained in the case of *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 59. In the case before us, the defendant, against whom the judgment was taken, could not have used the defence which Robert May had to the action, nor was he in a situation to do so, as a judgment had been entered against him. If Pinckney May had satisfied that judgment, he would have been entitled to recover the half of it from Robert, and thus Robert would have been compelled to pay a debt against which he had a just defence, by reason of the court's having permitted the plaintiffs to dismiss his action as to him. It is clear, that this should not be tolerated, where there is any suspicion that the plaintiff's object is to get rid of a defence to his action. Thus a surety, who is sued with his principal, may, by collusion with the plaintiff, suffer a judgment to go against him, and, after satisfying it, compel the plaintiff to refund, and thus force him to pay an unjust debt, unless he should be able to show the collusion—a matter difficult to be proved. From the facts appearing in this record, we are of opinion that the court below improperly exercised its discretion in permitting the plaintiff to dismiss his action as to the defendant Robert May. The judgment, therefore, will be reversed and the cause remanded ; the other judges concurring.

## EVANS, Respondent, v. GIBSON, Appellant.

1. Where under a judgment against several persons for a partnership debt a levy is made upon partnership property or upon the private property of one partner, and one of the partners purchases the same at the execution sale, the sheriff's sale will not, it seems, operate in equity a transfer of the title to the purchaser; it will still be subject to levy under the same judgment if the same remain unsatisfied.
2. Where one partner expends the partnership funds in the purchase of property in his own name, he will hold the same in trust for the partners.
3. The relief afforded by the decree in a cause should conform to the case made out in the petition.

*Appeal from St. François Circuit Court.*

This was a suit by Jesse R. Evans and James S. Evans against James Gibson. The petition was substantially as follows: Plaintiffs state that the defendant, in 1854, entered into a contract in writing with Alfred Reed—who was at the time acting partner of the firm of A. Reed & Co., in which plaintiffs were partners, which firm was afterwards known under the style of J. S. Evans & Co.—to convey to said Reed or the firm two certain lots of ground in Kennett's square, of about an acre each; that said contract has been delivered over to defendant by Reed for the purpose of cheating and defrauding plaintiffs; that said lots were purchased by Reed for the firm, and he paid for them out of the means of the firm; that he improved them, expending some \$1,000 or \$1,200 in erecting substantial buildings upon said lots, out of the funds of the partnership; that Reed put only a small amount of money or property in the firm, and the said firm and its business was carried on mostly by the means and credit of plaintiffs; that Gibson was to receive for said lots eighty dollars; that he did receive, in part payment, thirty-seven dollars and seventy-eight cents in goods from the store of J. S. Evans & Co.; that afterwards James S. Evans, in behalf of himself and his partners, tendered Gibson fifty dollars as the balance of purchase money and demanded a conveyance.

Plaintiffs further stated that in 1856 judgments were rendered against said firm, composed of A. Reed, J. S. Evans, and Jesse R. Evans, which were a lien upon their interests in said land; that under one of these judgments in favor of James A. Eddy and others, an execution issued and was levied upon said lots, and James S. Evans became the purchaser; that the sheriff's deed conveyed to said J. S. Evans all the right Reed had at the date of the rendition of the judgment; that Reed, being the acting partner, used the property and cash of the firm for his own private purposes; that so soon as he found out that his iniquitous practices had been discovered, he, for the purposes of injuring plaintiffs, gave up to Gibson the written obligation for a deed for the lots above mentioned, advising Gibson to contend for the lots as his, and if he succeeded in cheating plaintiffs out of what they had expended in the purchase and improvement of said lots, to pay over to Reed a certain portion of the proceeds; that defendant had full knowledge of Reed's fraudulent designs and practices, and conspired to assist Reed in cheating them out of the lots and the money expended upon them. Plaintiffs bring into court the money that may be due Gibson on the purchase of said lots, and pray that he may be compelled to bring into court the written agreement above referred to; and that he may be compelled by a decree of court to convey the lots in question to plaintiffs.

It appeared in evidence that the judgment in favor of Eddy and others was rendered November 1, 1856. The title bond referred to was given up to Gibson November 21, 1856. There was evidence introduced tending to show that the lots were purchased and improved with partnership funds. After the evidence was closed, the court allowed the plaintiff to amend the petition by striking out the name of Jesse R. Evans as plaintiff, and rendered a decree vesting the property in the plaintiff James S. Evans.

*Noell and Carter*, for appellants.

I. The bill is multifarious, and mixes up equities of the

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Evans v. Gibson.

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firm of James S. Evans & Co. with the equity of James S. Evans as purchaser at the sheriff's sale. This sheriff's deed is, as to J. S. Evans, void. He could not, under the circumstances, purchase the property and hold it against the other partners. The court erred in admitting the sheriff's deed.

*Frissell*, for respondent.

I. As between Gibson and Reed there was an attempt to cheat and defraud James S. and Jesse R. Evans. The lots were purchased and improved with the funds of the copartnership.

NAPTON, Judge, delivered the opinion of the court.

The decree in this case appears to be based entirely upon the title acquired by the plaintiff, J. S. Evans, at the sale under execution against A. Reed & Co. As the judgment, under which this execution issued, had been obtained on the 1st of November, 1856, and the delivery of the title bond by Reed to the defendant did not occur until the 21st of November of the same year, the plaintiff, who purchased at the sheriff's sale, was supposed to have acquired all the title of Reed; so that, at the date of Reed's attempted relinquishment to Gibson, he had nothing in the land to relinquish. Hence the decree, after the name of Jesse R. Evans was stricken out from the case as plaintiff, was for James S. Evans, the purchaser of Reed's interest at the sheriff's sale, and the legal title of Gibson, the defendant, was vested solely in him.

The judgment of the court appears to be entirely independent of all the allegations of fraud and trust, which constituted the very basis upon which the petition was framed. The decree proceeds upon a theory of the case not assumed in the petition. Although the judgment against A. Reed & Co., in November, 1856, the execution, the sheriff's sale under it, and the purchase by one of the plaintiffs, are stated in the petition, yet they are not relied upon as constituting an independent ground for relief, but are merely referred



to in connection with the more specific charges of fraud and trust. The decree is therefore a complete departure from the pleadings, and is based upon a case not averred in the petition.

Aside from this objection, however, which is merely formal, we do not regard the purchase by Jas. S. Evans as having the effect which the circuit court seems to have attributed to it.

It is not material, in determining the character of this purchase, whether the lots are to be regarded as the property of the partnership or the individual property of Reed. The former is asserted throughout the petition, and is the theory which the plaintiffs could not of course controvert without a radical change in their bill. Upon this supposition, we have, then, a judgment and execution against a partnership, and partnership property levied on and sold to one of the partners. Will such a purchase be regarded in a court of equity as converting the property from the partnership to individual property of the purchasing partner? The debt for which the property is sold is the debt of all the partners, and the partner who bids is under as much obligation to pay it as either of the others.

If the lots belonged to Reed and not to the partnership, would the purchase transfer the property from Reed to J. S. Evans? Each partner and his individual property is liable for the debts of the concern, as well as the partnership property. If the sale could have the effect of transferring the title from Reed to J. S. Evans, it is clear that it would still, as the property of Evans, be subject to levy for the same debt, if the execution remained unsatisfied. We suppose a court of equity would, in such cases, regard the title as unchanged. It is the case of a tenant in common buying up an encumbrance, which a court of equity always has considered as enuring to the benefit of the common title.

If this be so, it is obvious that the merits of this case will not be affected by the sheriff's sale in November, 1856, and that this incident will not dispense with the necessity of an inquiry into the allegations of trust or fraud, and the case must be remanded with a view to this investigation.

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Caldwell v. Dickson.

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It is, however, proper to add, as the case goes back, that the petition in this case, in any theory of relief sought, is singularly deficient. There is no allegation that the partnership of A. Reed & Co. has ever been dissolved, nor that any settlement has ever been had of the partnership concerns, nor that Reed is indebted to the partnership. There are allusions made in the petition to charges of embezzlement, from which it might be inferred that Reed was no longer a member of the partnership, and that the partnership had in fact ceased to do business, but these are mere conjectures. Nothing definite is stated in the petition on these points.

So far as the facts are developed by the testimony now in the bill of exceptions, it would seem that the important inquiry will be whether the lots in controversy were purchased with partnership funds; if so, whether the defendant was aware of the equitable interest of the other partners at the time he procured from Reed a delivery of the title bond; and if both these issues were found favorably to the complainants, they are certainly entitled to a decree in the event that Reed is no longer a member of the partnership, and that his accounts have been adjusted. The other judges concurring, the judgment is reversed and case remanded.

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CALDWELL, Appellant, v. DICKSON, Respondent.

1. A motion for a new trial on the ground of newly discovered testimony must be supported by the affidavit of the witness or witnesses expected to testify to the newly discovered facts.

*Appeal from Marion Circuit Court.*

This was an action on a note given for the hire of a slave for a year. After eleven months of the year had expired, the plaintiff had taken the slave from the possession of the defendant, and had sold her. The defence is based upon this fact.

*Anderson*, for appellant.

*Vanswearingen*, for respondent.

EWING, Judge, delivered the opinion of the court.

The evidence of the witness William B. Caldwell was properly excluded for irrelevancy. The paper to which he referred was a different one from that on which the suit was founded; he had no knowledge that it was ever delivered to the respondent, or that it was ever seen by him. The declarations of the respondent, as testified to by another witness (Hays), related to a paper not containing the stipulation of that mentioned by Caldwell, but one which was executed by the appellant and delivered to Dickson, which he (Dickson) admitted to be a part of the agreement respecting the hiring. This instrument gave respondent the right to return the slave to her owner before the year expired, if he chose to do so. These declarations of the respondent, as detailed by the witnesses, are also consistent with his answer to the rule to produce an instrument which plaintiff alleged contained a different stipulation. In no view, therefore, that we can take of the evidence of the witness Caldwell, whether considered alone or in connection with the testimony of other witnesses, had it any tendency to prove a contract of the kind alleged to have existed, and there was no error in excluding it.

The instructions asked by the respondent were based upon the hypothesis of an agreement between the parties to the suit, by which plaintiff was permitted to regain the possession of the slave, before the expiration of the year, in the event he should desire to sell her, respondent paying for the time he might keep her. There was no evidence of any such agreement, and nothing upon which to predicate such instructions, and they were properly refused.

The only remaining point is, the refusal of the court to grant a new trial. The ground alleged was newly discovered evidence. The affidavit in support of the motion states that the affiant has learned upon good and sufficient authority that there is a witness by whom he can prove that the instrument of writing containing the terms of the hiring of the slave contained a condition authorizing the plaintiff to take

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Pipkin v. Allen.

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said slave away from the defendant at any time during the year in case he chose to do so; that he had used great exertion to produce the evidence previous to the trial, but failed, and believes he can procure it at the next term of the court; and that he had no knowledge of the existence of this evidence before the trial, &c.

The application is defective for several reasons, but chiefly because the affidavit of the witness himself is not produced, stating the facts he would testify to on the trial. This should have been done, or some cause shown for failing to do so. In such cases, the best evidence of the truth of the allegations should be given, in order to guard against unfounded applications for new trials. It is not enough for the moving party to swear that he is *informed* and *believes* or has *learned* that new evidence has been discovered, or that a new witness has been found. The information must come directly from the newly discovered witnesses, so that it may appear what they really are to testify. (3 Graham & Waterman, New Trials, 1067; Boggs v. Lynch 20 Mo. 566.)

The judgment will be affirmed; the other judges concurring.



PIPKIN *et al.*, Defendants in Error, v. ALLEN & WIFE, Plaintiffs in Error.

1. Where a final judgment in a partition suit has not been rendered, a writ of error will not lie.
2. Where two own a tract of land as tenants in common, and a third person acquires title to a portion thereof by adverse possession under the statute of limitations, the portion thus lost will be the common loss of the two estates held in common, and will be distributed between them according to their respective interests.
3. Where a person, owning a tract of land containing, say twelve hundred acres, conveys five hundred acres thereof, not designating the land conveyed by metes and bounds, the purchaser will hold an undivided interest in the whole proportional to the number of acres conveyed to him.

*Error to Jefferson Circuit Court.*

This was an action for partition of a tract of five hundred and forty arpens of land. The facts are briefly as follows: The plaintiffs Pipkin and Beal claim to be tenants in common with the defendants of said tract. Plaintiffs claim two hundred acres each, leaving forty acres for defendants. David Boyle claimed a settlement and improvement right containing one thousand two hundred and twenty arpens. Six hundred and forty acres of this tract were afterwards confirmed by the United States. On the 23d of November, 1813, Boyle executed a deed of conveyance, recorded February, 1814, in favor of William Russell. By this deed Boyle conveyed to Russell a tract of seven hundred and twenty arpens, described as follows: "Seven hundred and twenty arpens of land, be the same more or less; that is to say, that said David Boyle claimed a settlement and improvement right of one thousand two hundred and twenty arpens of land situated on Sandy Creek, in the late district (and present county) of St. Louis, five hundred arpens of which have been selected by the recorder of land titles as being ratified by the law of Congress; which five hundred arpens the said David Boyle and Jenny his wife have sold to James Anderson; the balance and remainder of the said tract and claim of land, being seven hundred and twenty arpens, on Sandy Creek as aforesaid, which said balance of seven hundred and twenty arpens, be the same more or less, as the title thereof, or of any part thereof, is or may be eventually ratified, he, the said David Boyle, for the sum and consideration aforesaid, does by these presents grant, bargain and sell to the said Russell, his heirs and assigns forever, together with all hereditaments and appurtenances which to the said seven hundred and twenty arpens in anywise belong, to him the said Russell, his heirs, &c., at the entire risk and hazard by him, the said Russell, without any recourse whatever to the said Boyle or his heirs for the consideration money, or for any other costs," &c. Plaintiffs claim title

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under said James Anderson. Anderson died in St. Louis in 1812.

On the 28th of February, 1814, Boyle conveyed by metes and bounds five hundred arpens of said tract of one thousand two hundred and twenty arpens to Adam Brown. Evidence was introduced with a view to show that the tract thus conveyed to Brown was the same that had been previously conveyed to Anderson. Brown, in 1815, conveyed the same to one Hammond. Hammond conveyed four hundred acres to William Russell in 1817. Hammond conveyed one hundred acres to one Metts. This tract of one hundred acres conveyed to Metts had been in the adverse possession of Metts for more than twenty years. It was embraced within the six hundred and forty acres confirmed to Boyle. Evidence was introduced with a view to show that the sale of Boyle to Anderson had been rescinded. It consisted of statements made by a witness to the effect that he had, after the sale to Anderson, seen the horse and cart, that he understood constituted the consideration given by Anderson to Boyle, in the possession of Anderson. Defendants claim title under William Russell.

The court gave the following instructions at its own instance: "1. The adverse titles of the plaintiffs and defendants in this cause depending on a priority of the dates of their acquisition by each respectively from David Boyle, the confirmee, the jury will render their verdict for the party who has shown the prior right. 2. The defendants, having shown a chain of title deeds from David Boyle to themselves, are entitled to their verdict, unless the plaintiffs have satisfied them that before the date of the deed of Boyle to Brown, said Boyle had sold the land in controversy to James Anderson, which sale remained uncanceled or undisposed of by him at the date of his (Boyle's) deed to Brown; and if they find the latter proposition to be true, they will find for the plaintiffs. 3. By the law in force in the territory of Missouri at the date of the alleged sale by Boyle to Anderson, a verbal contract of sale was sufficient to pass a title from



him to said Anderson, and no deed was necessary for that purpose."

The court gave the following instruction at the instance of the plaintiffs: "4. The recital contained in the deed from David Boyle to William Russell dated November 22, 1813, that David Boyle and Jenny his wife had sold to James Anderson five hundred arpens of the tract of land mentioned therein, is evidence of that fact for their consideration against the present defendants; and unless the jury find from the evidence in the case that such sale was afterwards cancelled by the parties, the plaintiffs are entitled to an interest of five hundred arpens in the tract of land mentioned in the petition, and the jury will so find."

The defendants asked the court to instruct the jury as follows: "5. If the jury find from the evidence that Metts became the owner of one hundred acres of the land, five hundred arpens, in controversy, then, if the plaintiff recovers at all, he can only recover the five hundred arpens diminished by one hundred acres. 6. If the jury find from the evidence that the agreement between Boyle and Anderson in reference to the five hundred arpens of land was rescinded, or that the agreement was transferred by Anderson to Brown, and that Boyle made the conveyance to Brown in fulfillment of the agreement, the plaintiff can not recover, and the jury will find for the defendants." Of these the court refused instruction No. 5, and gave instruction No. 6.

The jury found the plaintiffs "entitled to three hundred and twenty-five acres of the land in controversy." The court ordered that partition be made among the parties according to their respective rights as ascertained, and appointed commissioners to make partition. At this stage defendants sued out a writ of error to the supreme court.

*Frissell*, for plaintiffs in error.

1. Plaintiffs, if they have any rights, have mistaken their remedy. There is no tenancy in common in the case. No one sets up a claim adverse to Mrs. Allen to the land outside

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the five hundred arpens. Pipkin and Beal own by metes and bounds. The boundaries of the five hundred arpens are clearly defined in the deed from Boyle to Brown. The instructions given were erroneous. The first instruction assumes that the titles of both plaintiffs and defendants are good, without referring to any fact to be found by the jury. The second instruction is also erroneous. The third instruction is also wrong. Verbal sales under the Spanish law, to be valid, must be followed by possession. Anderson never was in possession. Metts owned one hundred acres out of the five hundred arpens. Plaintiffs had no right to make that land off of defendant. The instruction asked by defendant should have been given.

*Noell* and *Beal*, for defendants in error.

I. There is no final judgment upon which a writ of error will lie. (26 Mo. 506 ; 20 Mo. 432.) The interest of Pipkin and Beal was an undivided interest as tenant in common. The five hundred arpens were to be carved out of the whole survey. The deed to Brown is to be thrown out of the account. We are not bound by the recitals of that deed. The sale to Anderson was prior in point of time. Anderson was dead when the deed to Brown was executed.

Scott, Judge, delivered the opinion of the court.

The question whether the plaintiffs and defendants were tenants in common of the land in controversy was not raised on the trial in the court below ; it is not, therefore, regularly here. But we will consider whether there is any foundation for that objection. Boyle was possessed of a large tract of land. He made a deed to Russell, in which it is recited that the said Boyle claimed a settlement and improvement right of twelve hundred and twenty arpens of land situate on Sandy Creek, " five hundred arpens of which have been selected by the recorder of land titles as being ratified by the laws of Congress ; which five hundred arpens the said David Boyle and Jenny his wife have sold to James Anderson ; the

balance and remainder of the said tract and claim of land, being seven hundred and twenty arpens, situate on Sandy Creek as aforesaid, which said balance of seven hundred and twenty arpens, be the same more or less, as the title thereof, or of any part thereof, is or may be eventually ratified, he, the said Boyle, for the sum and consideration, &c., does by these presents grant, bargain and sell to the said Russell," &c. The recorder of land titles confirmed six hundred and forty acres of this tract. There is no evidence that he ever selected five hundred arpens; indeed we know this is not so. There is, then, no description of the five hundred arpens conveyed to Anderson. The case is like that of a man's owning a tract of land containing fifteen hundred acres, and he sells five hundred acres of the tract to another without any other description. In such case, would the deed be void for the uncertainty of the manner in which the land conveyed was described; or, *ut res magis valeat quam pereat*, would not the vendee hold as tenant in common with the seller, and would not the tract be divided between them in proportion to their respective interests? Such we conceive to be this case. Russell succeeding to the right of Boyle, stands in the same relation to Anderson that Boyle did.

If there is once a tenancy in common established between the holders of the Russell and Anderson titles, it must follow that, Metts entering subsequently on the land and occupying a portion of it adversely before any partition or division of the common land, the portion obtained by him under the statute of limitations must be the common loss of the two estates held in common. Although Brown claimed Anderson's interest located by metes and bounds, and sold it to Hammond by metes and bounds, and Hammond a portion of it by metes and bounds to Metts, yet it is obvious that these acts could not affect those claiming Anderson's interest by a prior right. Brown and those claiming under him could not, by their acts and declarations, affect the interests of those who were strangers. Although those claiming under Brown had located Metts on a particular part of the tract, yet they had no right

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to do so at the expense of those who held an interest in Anderson's claim prior to that of Brown. Then, as the tenants of the Anderson and Russell titles had undivided interests in the confirmation of six hundred and forty acres, if a portion of the common property is lost, the loss must be borne by the tenants in common in proportion to their respective interests. There was, therefore, no error in refusing the defendants' instruction to the effect that Metts' claim should be deducted entirely from the interest of those claiming under Anderson. Indeed, according to the calculation we make, the allotment of the portions, as made by the court, was much more favorable than the rule we have laid down would warrant. Say Anderson's five hundred arpens (rejecting fractions) was equal to four hundred and seventeen acres; then his proportion of the loss—the entire loss being one hundred acres out of the six hundred and forty, which was all that was confirmed—would be sixty-four acres. Russell's interest being two hundred and twenty-three acres, the remainder of the six hundred and forty acres, after deducting the four hundred and seventeen acres, would be about thirty-six acres. This would give Anderson three hundred and fifty-three acres, and Russell one hundred and eighty-seven acres. The portion given to those claiming under Anderson by the decree is three hundred and twenty-five acres, and that to those claiming under Russell is two hundred and fifteen acres. This is an answer to the error complained of in the instruction given at the instance of the plaintiffs, by which the jury were directed that the interest of the plaintiffs in the land in controversy was five hundred arpens.

We do not conceive that there is any cause for complaint on the part of the defendants against instructions numbered one and two. The two instructions, taken together, were as favorable as the case made by the defendants would warrant. Although the jury was told by the first instruction that they should give their verdict for the party showing the prior right, yet the second instruction following immediately after, and explaining the first, presented the defendants' case in as favorable a light as they could have desired.

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This writ of error having been sued out before there was a final judgment—the judgment being that partition be made, and no partition having been made and confirmed—will be dismissed.

The other judges concur. Writ dismissed.

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COLLINS, Defendant in Error, v. WARREN *et al.*, Plaintiffs in Error.

1. A. and B. were partners; a lot of ground was conveyed to them. The lot was improved, a dwelling house built thereon became the residence of B. B., after living in it for several years, died leaving his widow in possession of it. Previous to the death of B., A. instituted a suit against B. for an adjustment of the partnership concerns, and prayed a sale of the said lot for the payment of partnership debts, it being alleged to be partnership. After the death of B., the suit was revived against his administrator only. After the institution of the suit and before the death of B., C. bought all the interest of B. in the lot at sheriff's sale, it having been mortgaged to C. A. made C. a defendant by supplemental bill, on the ground that he had purchased with notice of the rights of A. A decree was rendered against B.'s estate, and a sale of the lot was awarded, and the interest acquired by C. was postponed until the debt adjudged to A. should be first paid. At the sale under the decree A. became the purchaser of the lot. He instituted an action of ejectment against the widow of B. *Held*, that not having been made a party to the suit of A. she was not bound by the decree, and it could not be used as evidence against her; that under the circumstances, the plaintiff in ejectment could only recover an undivided half of the premises and corresponding damage.
2. Where a lot with a dwelling house thereon is owned by two persons as tenants in common, and one dies in possession of the whole, leaving a widow residing therein, she will not be entitled, under the sixteenth section of the dower act of 1845 (R. C. 1845, p. 432) as against the surviving tenant in common, to remain in possession of the whole lot until dower is assigned her.

*Error to Hannibal Court of Common Pleas.*

The facts in evidence sufficiently appear in the opinion of the court. The court, at the instance of the plaintiff, instructed the jury as follows: "Although it may appear from the evidence that Thomas N. Warren in his lifetime and during his coverture with Maria Warren, the defendant, was

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seized of an estate of inheritance in the whole or any undivided part of the premises in controversy; and although it may also appear that said Maria is the widow of said Thomas N. Warren, and that the said Thomas N., at the time of his death, was residing on the premises in question, yet if it further appear from the evidence that, after the said Thomas N. so became seized and before his death, all the interest and estate of the said Thomas N. were duly sold and conveyed to How, Claflin & Cook, and that the interest and estate so conveyed to How, Claflin & Cook were, before the institution of this suit, conveyed and transferred to the plaintiff, the jury should find a verdict for the plaintiff for the possession of the premises in question. And the court instructs the jury that the document read in evidence, purporting to be a deed from sheriff King to How, Claflin & Cook, if genuine, is sufficient in law to pass the title and estate of said Thomas N. Warren in said premises to said How, Claflin & Cook; and that if the document read in evidence, purporting to be a deed from sheriff Maddox to the plaintiff Collins, is genuine, the same, with the proceedings on which the same is based, is sufficient in law to pass to the plaintiff all the title and right of said How, Claflin & Cook in the premises."

The following instruction asked by the defendant was refused by the court: "By the deed of Higbee to Warren and Collins of the lot during the coverture of defendant, and her husband dying in possession of the mansion house, the defendant had a dower interest in said lot and house, and she was entitled to the possession of said house and lot until her dower was assigned to her, and they should therefore find for the defendant."

The jury found for the plaintiff.

*Porter & Harrison*, for plaintiff in error.

I. Warren was seized of an estate of inheritance in the premises. The husband had a mansion house thereon. Mrs. Warren had not relinquished her right to dower. She had the right to remain in possession until dower was assigned



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her. The instruction given was erroneous. (R. C. 1845, p. 430; 4 Kent, Comm. 62; 1 Halst. 369; 3 Halst. 129; 3 J. Marsh. 48.)

*Dryden and Lipscomb & Lakenan*, for defendant in error.

I. The instruction given was correct. Until dower was assigned defendant had no right to enter upon the property in question. (3 Bac. Abr. 212; 4 Kent, Com. 59; 7 Johns. 247; 17 Johns. 167; 20 Johns. 411.)

SCOTT, Judge, delivered the opinion of the court.

It appears from the record and pleadings in the case that Wm. R. Collins and Thomas N. Warren, the husband of the defendant Maria Warren, were partners. In December, 1848, Stephen Higbee conveyed the lot in controversy in this suit to the said Collins and Warren. The lot was improved, it is alleged, with the partnership funds, and the house built thereon became the residence of T. N. Warren, until some time in 1852, when he died, leaving the defendant, his widow, in possession of it. Prior to the death of Warren, his partner Collins instituted a suit against him for the adjustment of the partnership concerns, and for the sale of the lot in controversy for the payment of the partnership debts, it being alleged to be partnership property. Warren died during the pendency of this suit, and it was revived only against his administrator. Afterwards a decree for a large sum was rendered against Warren's estate, and a sale of the lot was awarded to satisfy it. Under this decree, Collins became the purchaser of the lot and received a deed therefor in 1856. The suit by Collins against Warren was begun in February, 1849; and in March, 1849, How, Clafin & Cook bought, at a sheriff's sale, all the interest of Warren in the lot, it having been previously mortgaged to them. After this, Collins filed a supplemental bill making How, Clafin & Cook parties defendant to his suit, on the ground that they purchased with notice of his rights, and by the decree their

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interest was postponed until the debt adjudged to Collins should be first satisfied.

All this controversy has arisen from the failure of Collins to make Mrs. Warren a party to his suit after the death of her husband. She, not being a party to the suit, is not bound by the decree pronounced in it; nor is it any evidence against her. But it must be said that if the lot was partnership property, and her husband as partner was insolvent, and it was sold for the payment of the partnership debts, she would not be entitled to dower in it. (*Duhrig v. Duhrig*, 20 Mo. 174.) As she however was not a party to the suit, she is not concluded by the decree, and has a right, in a suitable proceeding, to contest the truth of the facts on which it is founded. It follows, then, that the instruction given by the court at the instance of the plaintiff was erroneous. Although the sheriff's deed to How, Claflin & Cook might have passed all of Warren's interest in the lot, and left him without any, yet that is an outstanding interest not in Collins, and, this being an action of ejectment, he being a plaintiff can not recover on a title in a third person. It is true that the decree postponed this title to that acquired under it, but that decree not being evidence against the defendant, Maria Warren, it can not be used to show any title in Collins as against her.

If the decree in Collins' suit, the mortgage to How, Claflin & Cook, and the subsequent sheriff's deed to them, be thrown out of the case, the plaintiff's right to recover must stand on the deed of Higbee to Collins and Warren. This deed makes them tenants in common of the lot in controversy, and on the death of Warren his widow would be entitled to dower in his interest in the lot; and this being a suit to eject her from the possession of the entire lot, she relies on the dower law in the code of 1845, and defends herself under the sixteenth section thereof, which enacts that until dower be assigned the widow may remain in and enjoy the mansion house of her husband and the messuages or plantation thereto belonging, without being liable to pay any rent for the same.

Now, although, under this section, a widow may sue to recover her quarantine when ejected, or may defend herself under it against an action of ejectment by the heir or those claiming under him, yet, under the case as stated, we do not consider the section referred to furnishes her any defence to this action. Two are tenants in common of a house and lot; one of the tenants, who is in possession, dies, leaving a widow; can such widow, under the above cited section, hold the possession of the entire house and lot, freed from the payment of rent, to the exclusion of the surviving tenant? Could the legislature have intended that the section should apply in such a case, and the widow be entitled to retain the entire house and lot, excluding the cotenant and depriving him of all rent for his property? Now, whether the widow's right be a third, a half, or a child's part, on what principle can the law give her a right to remain in the entire mansion house at the expense of a cotenant, who has a great, if not a greater, interest in it than she has? It may be competent to the legislature to do such an act by laws operating prospectively, but respect for that department of the government would prevent us from holding the opinion that any such thing was ever contemplated. The law was only designed for the cases where the husband died the sole owner of the mansion house. It must be his and his exclusively. It was never intended that the widow should have her quarantine at the expense of those who are in no ways connected with her.

This, then, being a case in which the widow can not have any quarantine, she stands as she would at common law, when her quarantine had expired. She would be ejected by the heirs, and made to pay damages. But this suit is not by the heir. It goes on the hypothesis that the plaintiff is only entitled to the one undivided half of the house and lot. On what ground, then, can he recover the entire lot and damages for the occupation of the whole of it? He could only be entitled to the half of the lot, and damages for that half, going on the supposition on which the case is now put. Whether

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Mrs. Warren had any title or not, the deed from Higbee, on which alone the case now rests, showing that he is only entitled to one half of the lot, he can recover no more than that quantity, and of course only corresponding damages. (Gray v. Givens, 26 Mo. 291.)

We are of the opinion that in this action the plaintiff can recover one undivided half of the lot and corresponding damages; and this cause is reversed and remanded, as it appears that the judgment is for the entire lot and for full damages.

Reversed and remanded. The other judges concur.



JANUARY *et al.*, Appellants, v. POWELL & Co.'s ASSIGNEE,  
Respondent.

1. There is nothing in the act concerning voluntary assignments, (R. C. 1855, p. 202,) which authorizes the circuit court, on a motion of a creditor, to direct the assignee to let in such creditor and allow him to prove up his demands against the assigned effects.
2. If the assignee improperly refuse to allow the creditor to prove his claim, the proper remedy for the creditor to resort to is a writ of mandamus.

*Appeal from St. Louis Circuit Court.*

This was an application in behalf of D. A. January & Co., E. C. Sloan, and Osborne & Tolle, to the St. Louis circuit court, for an order directing Josiah G. McClellan, assignee of the firm of Powell & Co., to appoint a new day for the hearing and allowance of demands not previously allowed, and to give due notice thereof. The motion set forth that the plaintiffs therein have demands against the late firm of Powell & Co., who assigned all their property and effects to William R. Biddlecome in trust for the benefit of their creditors; that said Biddlecome appointed the 28th of April, 1859, as the day for hearing demands against the property and effects assigned to him; that, owing to the sickness of said Biddlecome on the said 28th of April, Josiah G. McClellan was

substituted as assignee in his stead; that this substitution took place in the afternoon of said 28th of April, and the said McClellan commenced hearing claims against the estate and effects assigned, about three o'clock in the afternoon of said day; that owing to a misunderstanding arising out of the sickness of the original assignee, the substitution of another in his stead, and to other causes set forth in the affidavits therewith filed, the demands of the undersigned were not allowed on the day appointed, but all of them were presented on the next day, when the acting assignee refused to receive them or hear proof of them. The plaintiffs, on the motion, prayed the court to make an order on said McClellan, the present assignee, requiring him to appoint a new day for the hearing and allowance of demands not allowed on the former day, and to give notice thereof to the creditors according to the statute, the costs of such notice to be taxed against the parties in default and to be deducted from the amount of their dividends.

Affidavits were filed in support of the motion. At the hearing of the motion these affidavits were read and oral testimony was adduced. From all the testimony introduced it appeared in substance that Powell & Co. made the assignment as alleged in the motion; that notice was given by Mr. Biddlecome as stated; that on the said day appointed, the 28th day of April, 1859, Mr. Biddlecome was too unwell to do business, and about half-past twelve o'clock of that day he resigned his trust and the circuit court immediately appointed said McClellan assignee in his stead; that said McClellan at once qualified, and gave bond, and about the hour of three o'clock P. M., he went to the office of Mr. Biddlecome and commenced hearing proof of demands. There was no one at the office of Mr. Biddlecome to hear claims until Mr. McClellan went there at three o'clock. He remained there hearing claims until about half-past six o'clock. He did not, for want of time, finish hearing claims on that day, but adjourned said hearing until the next day. On the next day he refused to hear proof of any claims that had not been pre-



sented the day before. It appeared that Mr. Biddlecome went to his office on said day about half-past eleven o'clock, but went away in a few minutes; that about that time a notice was posted up in the office that the hearing of claims would be proceeded with at three o'clock P. M. The affidavits also tended to show misunderstandings arising out of the resignation of Mr. Biddlecome and the appointment of McClellan. The court overruled the motion.

*S. A. Bennett*, for appellants.

I. An appeal lies in this case. The circuit court had power to make the order, or whatever order was suitable to accomplish the purpose of letting the petitioners in to prove up their demands. They were entitled to the order as a matter of right. They were misled. The substituted assignee should have given a new notice. The petitioners did appear at "the time and place of adjusting and allowing demands against the estate." (R. C. 1855, p. 206, § 25.) The adjournment to the next day was an extension of time.

*G. P. Strong*, for respondent.

I. Neither the assignee nor the court had the power to extend the time for the presentation of claims beyond the day fixed in the notice. The statute allows but one day for the presentation of demands. Nothing prevented the presentation on the 28th of April except the negligence of the claimants. The new assignee took up the matter precisely where it was left by Mr. Biddlecome. It was his duty to adopt all that his predecessor had properly done.

SCOTT, Judge, delivered the opinion of the court.

This proceeding was begun by a motion to the circuit court to require an assignee in insolvency to hear the claims of certain creditors of the insolvent, which he refused to do.

We do not see any foundation in the statute concerning assignments for the motion that was made in the circuit court. The matters in which the circuit court can control



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the assignee are all stated in the statute, and there is no warrant for going further. The assignee is by no means an officer subordinate in all things to the circuit court and a part of that court. It is necessary to preserve the forms of the law. Law can not exist without forms; and without them every thing will depend on the arbitrary will of a judge.

Taking all the circumstances into consideration, the assignee should have heard the claims. It would have been better if the substituted assignee had given a new notice. As there is no warrant for this proceeding in the law on the subject of assignments, the proper course would have been to apply to the circuit court for a mandamus on the assignee. That writ would have been sustained on general principles.

This judgment will be affirmed, and the course indicated will be at the option of the parties. Judge Ewing concurs.

[END OF OCTOBER TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JANUARY TERM, 1860, AT JEFFERSON CITY.

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GIBSON, Defendant in Error, v. PERRY *et al.*, Plaintiffs in Error.

1. Where premises are leased for a term of years and the lessee agrees to pay rent during such term, and the lessor does not covenant to rebuild, the destruction by fire of the buildings rented will not exempt the lessee from the further payment of rent; he must pay rent for the whole of the term.

*Error to Cooper Circuit Court.*

The plaintiff by agreement not under seal leased to the defendants a storehouse in the city of Boonville for a term of four years from the 14th of February, 1856. By this agreement the lessees engaged "to pay rent therefor quarterly, annually, at the rate of four hundred and fifty dollars a year, that is to say, the sum of one hundred and twelve dollars and fifty cents on the 15th day of May, 1856, and the like sum at the end of every three months thereafter during the continuance of this lease." This suit was brought to

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Gibson v. Perry.

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recover the rent alleged to be due for a quarter ending February 14, 1859. The defendants set up in their answer that the quarter's rent sued for accrued after the destruction by fire of the storehouse rented by them; that after the fire they demanded of the plaintiff that he should rebuild the storehouse or they would abandon and surrender the ruins; that plaintiff refused to rebuild, and defendants tendered and abandoned the ruins to him. The court, on motion of plaintiff, struck out this answer.

*Muir & Draffin and Douglass & Hayden*, for plaintiffs in error.

I. The court erred in striking out the answer. It set up a good and valid defence. The tenants were not bound to pay rent after the destruction of the house by fire.

*Adams and Stephens & Vest*, for defendant in error.

I. The defendants were bound to pay rent notwithstanding the destruction of the building by fire. The obligation of the defendants was created by their own contract. (See 15 Mo. 469; Ld. Raym. 1477; Chitty on Contr. 274; 2 Parsons on Contr. 184; 3 Kent, Comm. 467; Smith L. & T. 258; 2 Bouvier's Inst. 208; 1 Bibb, 536; 12 B. Monr. 254; Woodf. L. & T. 323.)

EWING, Judge, delivered the opinion of the court.

The law of this case has been long settled, and is supported by reason as well as authority.

The obvious principle, upon which the question has been determined by the adjudged cases, is that of an express covenant on the part of the lessee to pay the rent; that, having by his own contract created a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. (15 Mo. 469.)

In some of the earlier English chancery cases there was some inclination to relieve the lessee from the consequences

of this covenant to pay rent where the premises had been destroyed by fire. Among these cases is that of *Brown v. Quilter*, Ambler 619, which is the only one cited by counsel for the plaintiffs in error. In that case, the circumstance upon which relief was founded was the fact that the lessor had insured the premises and received the insurance money after they were destroyed by fire. But that case, as well as that of *Steele v. Wright*, cited in *Doe v. Standham*, 1 T. R. 708, which is said to have been to the same effect, have been long since overruled, and a contrary doctrine has prevailed in the courts of equity, as well as courts of law, both in England and America—namely, that a lessee of premises, which are burned by fire, has no relief on an express covenant to pay rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. (3 Kent, 467.)

The supposed hardship of this and like cases is found to have no real existence when the lease is viewed, as it should be, as a sale of the demised premises for the term for an agreed price. And whenever there is no covenant on the part of the lessor to insure against fire, nor any agreement to repair, the destruction of the property by fire, or any deterioration resulting from that or any other cause, is the misfortune of the lessee; and there is no principle of law or justice that would exonerate him from the charge which he has expressly and unconditionally imposed upon himself. The lessee, in such cases, has no greater claims for relief than parties to other classes of contracts which, having been deliberately entered into, have, by some unforeseen event or casualty, proved to be unremunerative or disastrous. And the supposed hardship of the case might be urged with equal plausibility as a ground of interference by the courts in almost all cases where, by reason of inevitable accident, one of the contracting parties has not derived the full measure of benefits he promised himself by the transaction. In cases like that under consideration, the same presumption exists and with like force as in other cases of sale of property—

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namely, that the tenant takes the property subject to every casualty. When the lease is taken, the lessee expressly stipulating to pay rent, he can with no more propriety say he pays the rent unjustly when the premises are destroyed, than he could complain of paying the purchase money of any piece of property of which he might be deprived by accident after buying it and before payment. The cases are analogous. The judgment will be affirmed; the other judges concurring.

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GIST, Defendant in Error, v. EUBANK, Plaintiff in Error.

1. The act concerning practice in the revised code of 1855 does not authorize a finding of the facts by the court in cases tried by the court without a jury; findings of the facts will therefore be disregarded by the supreme court in cases arising since the revised code of 1855 went into effect.
2. A petition seeking to enforce a contract concerning land is not rendered defective by reason of an omission to state therein that the contract is in writing; if the defendant rely upon the statute of frauds, he must set it up in his answer as a defence.

*Error to Moniteau Circuit Court.*

*Parsons*, for plaintiff in error.

I. The petition does not allege that the contract between plaintiff and defendant was in writing. (22 Mo. 334; Statute of Frauds.) It does not allege that plaintiff took possession of the land with the consent of defendant, nor that he made lasting and valuable improvements. There was nothing to take the case out of the statute. (2 Mo. 126; 20 Mo. 86.) The finding of the facts does not warrant the judgment.

EWING, Judge, delivered the opinion of the court.

This action was begun under the practice act now in force, which does not authorize the finding of facts by the court, as the act of 1849 did. The finding, therefore, will be dis-

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regarded ; and, as none of the evidence is preserved by the bill of exceptions, the only question for our determination is as to the sufficiency of the petition. In deciding this point, it is unnecessary to consider whether the facts and circumstances alleged in the petition show such a part performance as—supposing the contract not in writing—would be sufficient to take the case out of the statute of frauds and perjuries. Although a petition for the specific performance of a contract respecting real estate omits to state that the contract is in writing, and it does not appear from any of the allegations of the bill that it is not, yet it will be presumed to be a legal and valid contract until the contrary appear, and the petition will not be demurrable ; and in such case, if the defendant rely upon the statute of frauds, he must make that defence by answer. (*Wildbohn v. Robidoux*, 11 Mo. 660 ; *Cozine v. Graham and Baker*, 1 Paige, 182.)

The petition alleges the purchase of the land in controversy by the plaintiff and defendant Eubanks as partnership property from the defendant Morris, the payment of three of the four hundred dollars of the purchase money out of the partnership funds, and the execution of their joint note to Morris for the balance ; that by a subsequent agreement the three hundred dollars so paid for the land was charged to plaintiffs in the settlement of their partnership affairs, and he became responsible to Morris for the remaining one hundred, and that Morris was to execute a conveyance to plaintiff alone. It is also alleged that the partnership affairs are settled, and that plaintiff has performed his part of the agreement ; but that the defendant Eubanks forbids Morris from executing the conveyance according to the agreement. Whether the contract or agreement was in writing does not appear ; and as, according to the rules of pleading already stated, it was not necessary that this averment should have been made, the demurrer was properly overruled. It is true some facts are set forth in the petition which, supposing the contract to be in writing, would be mere surplusage, and may have been relied on by the pleader to take the case out of



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the statute, yet, inasmuch as the contract is set forth without qualification showing whether it is oral or in writing, we are not authorized, against the legal presumption in such cases, to infer it to have been the former, for the reason that the petition contains certain allegations appropriate only to the case of an oral agreement. The other judges concurring, the judgment will be affirmed.

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WILLIAMS, Plaintiff in Error, v. THE CHRISTIAN FEMALE COLLEGE, Defendant in Error.

1. In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority or a vote or resolution of the corporate authorities.
2. When a member of the board of trustees of a corporation, at a session of the board, makes a statement in respect to its action, and such statement is allowed to pass uncontradicted, such statement, although evidence against the board, is not conclusively binding upon it.

*Error to Boone Circuit Court.*

This was an action to recover the sum of \$1,437.13 alleged to have been awarded to plaintiff as the value of certain improvements made by plaintiff upon the grounds of the defendant. It was proved that the arbitrators who made the estimate of the value of the improvements were selected by the plaintiff and by Alexander Douglass and C. S. Stone, who were members, it appeared, of the board of trustees of defendant. The evidence relied on to show that the award was made under the authority of the board of trustees, or had their sanction and approval, was the testimony of John H. Field, who stated that "sometime in 1858, he was authorized by plaintiff to present for payment to the board of trustees of the defendant the award sued on; that in pursuance of such authority he was present at a meeting of said board in the month of February, 1858; that at said meeting, and whilst said board was organized and acting officially, he presented

said award for payment ; that thereupon C. S. Stone, a member of said board, stated to and in the presence and hearing of said board, and whilst officially organized as aforesaid, that he, Stone, Douglass and another, had been appointed a committee by the board of trustees of the defendant for the purpose of settling the claim of plaintiff; that the award had been made under the direction of said committee; that said award was not unsatisfactory to said committee, and would have been reported on by the committee to the board, but that certain books had been removed from the college; he (Stone) desired to be discharged from said committee and that some other member be appointed in his place; and thereupon several other persons were added to the committee; that nothing was said about carrying out the award or approving the same by the board; nothing was said about obtaining means to pay the same. I understood these additional members were added for the purpose of adjusting the plaintiff's claims."

The court, at the instance of the plaintiff, gave the following instruction: "1. If the award sued on was made under a submission by Stone and Douglass, and if after the making thereof the trustees of defendant, whilst assembled and acting in their official capacity, either tacitly or expressly assented to or ratified said award, the court will find for plaintiff the amount of said award, with six per cent. interest from its date."

The following instruction asked by plaintiff was refused: "2. The fact that the award sued on was submitted to defendant's board of trustees whilst assembled and acting in their official capacity, and the declaration of a member of said board then and there made, and not controverted or denied, that the same had been made under a submission by a committee appointed by said board, of which committee Stone and Douglass were members, is evidence that the submission by Stone and Douglass was under the authority of said board."

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The court gave the following instruction at the instance of the defendant: "Before the court can find for the plaintiff, it must be found that there was a submission to arbitration made by plaintiff and defendant, and an award made in pursuance thereof."

The plaintiff took a nonsuit, with leave, &c.

*Guitar & Gordon*, for plaintiff in error.

I. In order to authorize the submission by Stone and Douglass as the agents of defendant, a vote or resolution entered upon the minutes or record was not necessary. Such an appointment may be implied from acceptance of their services, or from the recognition or confirmation of their acts. (Angell & Ames on Corp. 220, 221, 270; R. C. 1855, p. 371, § 5, 8.) Express authority was not necessary. Such authority may be proved by the declarations of the agent whilst acting in his official capacity. (4 S. & R. 317; 1 Maryl. Ch. 398; Angell & Ames on Corp. 521.) The court erred in refusing the instruction asked.

*Prewitt*, for defendant in error.

I. The second instruction was properly refused. All that was law in it was contained in the first instruction. The facts stated in the second instruction do not, as a matter of law, prove a ratification of the award. (19 Mo. 557; 17 Mo. 145; 8 Mo. 260-1.) The evidence given does not warrant the instruction. An authority to settle does not imply an authority to submit to arbitration. How can the silence of the trustees imply a ratification? A vote was necessary. (R. C. 1855, p. 371; 26 Mo. 104; Angell & Ames on Corp. § 239, 232; 8 Mass. 298; 1 Greenl. Ev. § 199.) There was no ratification. A committee was appointed to adjust the very matter that was adjusted if the arbitration was ratified. It is nowhere shown that Stone and Douglass were members of the board. There was no award made; there was simply an estimate of what the work was worth. (10 Mo. 162.)

NAPTON, Judge, delivered the opinion of the court.

The only question presented by the record is whether, under the circumstances, the circuit court was warranted in refusing to give the second instruction which the plaintiff asked. The case was tried by the court without a jury. The object of the refused instruction seems to be to procure from the court a declaration of law, that a statement by a member of the board of trustees, made during the session of the board, being allowed to pass uncontradicted, is to be considered as binding the board. This is going further, we think, than the authorities will warrant.

There is no doubt that in order to establish an agency from a corporation, or an authority in a known and recognized agent to do certain acts on behalf of a corporation, it is not indispensable to show a written authority, or vote, or resolution of the corporation. In the present case, however, there was an attempt to prove an authority on the part of the committee to submit the matter in dispute between plaintiff and defendant to arbitration by the mere declaration of one of the committee. This is not like the case of recognized and regular officers, such as cashier of a bank, or secretary of a board, where the corporation has been in the habit of adopting or ratifying every thing done by them in a certain routine of duties. Here is a temporary committee of the board submitting a disputed claim to arbitration, which they say the board referred to them with authority to settle. If the authority to settle implied power to refer to arbitration, still it would seem that in order to make the award binding on the board, the committee must first approve of it and report it to the board as their settlement. The declaration of Stone, referred to in this case, did not show any final report of the committee, but that the committee failed to take further action by reason of some other difficulty which sprung up.

But it is clear that the declaration of Stone, or any other individual corporator, made in the presence of the board

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without contradiction, was not of itself conclusive as a ratification of the board. The mere silence or inaction of the board, under such circumstances, ought not to be regarded as conclusive. The subsequent reference to the same committee, with a change of some of its members, shows that such was not the understanding of the board.

If, then, the object of the instruction was to declare that admissions of one or more trustees were conclusive, the instruction asked was properly refused. But if the object of the instruction was simply to declare that the facts enumerated in it were competent evidence in the case, the refusal to give such an instruction could not be error, as the court, by admitting the evidence, had already declared it competent. The only reasonable interpretation to be placed upon the refusal on the part of the court when discharging the functions of both court and jury, to give such an instruction, would seem to be that the facts referred to in the instruction, although considered competent evidence, were not regarded by the court as satisfactory to the court sitting as a jury upon the question of ratification. Regarded in either point of view, there was no error in refusing the instruction.

Judgment affirmed; the other judges concur.



WERTHEIMER, Defendant in Error, v. MAYOR, COUNCILMEN,  
AND CITIZENS OF BOONVILLE, Plaintiffs in Error.

1. In cases arising under the ordinances of the city of Boonville in which the fines assessed do not exceed the sum of five dollars, the decision of the mayor is final; it can not be reviewed on appeal or *certiorari*; nor can a writ of prohibition be resorted to to restrain the collection of the fine.

*Error to Cooper Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.  
*Stephens & Vest*, for plaintiff in error.

- I. Fresh fish are not wild game within the meaning of the ordinance.

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II. This is not such a case as will warrant the issuing of a writ of prohibition. We have no statute regulating the remedy by prohibition. (See 1 Chitt. Pl. 444.) The suit will not lie to prevent a court from deciding erroneously, nor from enforcing an erroneous judgment. It can be sustained only for preventing usurpation of judicial power by a court which has no authority to decide the cause in which it assumes the right to act judicially. (See 3 Black. Comm. 112; Com. Dig. tit. Prohibition; 5 Bac. Abr. Prohibition; 2 Saunders, Prohibition; 2 H. Bl. 533; 3 Bouvier's Inst. 93; Arnold v. Shields, 5 Dana, 20; Washburn v. Phillips, 2 Metc. 296; 2 Hill, 367, 363; 7 Wend. 518.) The mayor of Boonville had jurisdiction in the case in which he was attempting to proceed. He imposed a fine for an alleged violation of a city ordinance. The mayor's construction of the ordinance may have been erroneous. He decided the case and exercised jurisdiction. (3 Pet. 206.) The Cooper court of common pleas, having no appellate jurisdiction or control over the mayor's court and no jurisdiction over the subject matter in controversy, had no right to issue a writ of prohibition. If any court could issue the writ, the circuit court alone could. It could not review the decision on appeal, or in any other way. A superior court can not issue a writ of prohibition unless it possesses jurisdiction over the subject matter in contest. (Bac. Abr. Prohibition; Reese v. Lawless, 4 Bibb, 394; 2 Chitt. Pr. 355; 19 Louis. 175; 12 Gratt, 17.) The court of common pleas is not a superior court to the mayor's court. They act in different spheres entirely. No appeal lies from the mayor's court to the court of common pleas. (See 4 Burr. 2034; 2 T. R. 473.)

*Douglass & Hayden and Hicks*, for defendant in error.

I. There is nothing in the record to show that any error has been committed by the court of common pleas. No ordinance is in evidence requiring fish to be sold at the market-house. The judgment will be presumed to be correct. (18 Mo. 256; 24 Mo. 522; 16 Mo. 384; 9 Mo. 441, 816; 5



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Mo. 522.) No question of law is saved. (19 Mo. 433.) There was no motion for a new trial. (11 Mo. 358, 623; 6 Mo. 162.) The court could not take judicial notice of the ordinances. (See 21 Mo. 112; 25 Mo. 567; 25 Mo. 580.) But upon the merits there is no error. Fish are wild game within the meaning of the ordinance, if there was any such ordinance. (Bac. Abr. tit. Game; 2 Kent, 348.) The purchase of it at any place other than the market-house was no violation of such ordinance. The mayor assumed a jurisdiction that did not belong to him. The writ of prohibition was properly issued. If fish are wild game, the mayor had no jurisdiction over the act of purchasing. He was properly restrainable by prohibition. (Bac. Abr. tit. Prohibition, p. 206-230; 2 Pet. 449; 1 Cond. Rep. 60; 77 Eng. Com. Law R. 696; Bull. N. P. 219; Sess. Acts, 1855, p. 75, 76.) The court of common pleas possesses the same powers as the circuit court. The objection to the jurisdiction was not made in the common pleas court and will not be heard here. (24 Mo. 411; 22 Mo. 402; 7 Mo. 211; 13 Mo. 4; 1 Mo. 515; 2 Mo. 171; 8 Mo. 59; R. C. 1855, p. 1300, § 33.) Not having filed a plea in bar, it is too late to plead the jurisdiction. (1 Chitt. Pl. 425; 2 Tuck. 254.)

SCOTT, Judge, delivered the opinion of the court.

This proceeding had its source in a writ of prohibition issued by the Cooper court of common pleas to the mayor of the city of Boonville and others, restraining them from collecting a fine imposed on the plaintiff Wertheimer by the said mayor for violating an ordinance of said city. The twenty-eighth section of the act incorporating the city of Boonville (Sess. Acts, 1839, p. 299) provides that the mayor and each justice of the peace within the city shall have jurisdiction of all cases arising under this act and under the ordinances of the city, subject however to an appeal or *certiorari*, in all cases above the sum of five dollars, to the circuit court of Cooper county; and such appeals and *certiora-*

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*ris* shall be granted and taken in the same manner as appeals and writs of *certiorari* are granted and taken from justices of the peace to the circuit courts. The act of February 13, 1847 (Sess. Acts, 1847, p. 185) confers on the mayor exclusive original jurisdiction over all cases arising under the act of incorporation and upon all ordinances of the city.

The following are two sections of an ordinance passed by the city of Boonville for the regulation of the markets of said city: "Sec. 11. Any person who shall purchase during market hours, at any other place in the city than at the market-house, any article required to be sold at the market place, shall, upon conviction, forfeit and pay a fine of five dollars. Sec. 22. Nothing in this ordinance shall be so construed as to prevent any farmer or raiser, or any person or firm who packs beef or pork, from selling his meat by the quarter, or from selling his bacon hams, shoulders or sides, or from selling spare ribs or sausage meat in the winter time, nor so construed as to prohibit the selling of venison or wild game."

Under these ordinances the plaintiff was fined five dollars for purchasing, out of the market house, during market hours, fresh fish. He applied for an appeal, which was refused by the mayor, as by the charter an appeal did not lie unless the fine was over five dollars. The plaintiff maintaining that fresh fish was wild game within the meaning of the ordinance, and that therefore the mayor had exceeded his jurisdiction in fining him for purchasing fresh fish, as such articles were expressly excepted from the ordinance, and applied to and obtained from the Cooper court of common pleas a writ of prohibition on the mayor restraining him from collecting the said fine. On this order or judgment a writ of error has been sued out from this court.

Many reasons were urged why the case should not be looked into nor reviewed by this court. This proceeding falls within that class in which the supreme court will reverse a judgment when on the record it appears that there is no legal foundation for the judgment. No bill of exceptions in such cases is necessary. The case may be disposed of as it

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is presented by the plaintiff himself. We conceive that the court below has arrived at a result that is directly against the law. The charter, in providing that appeals and writs of *certiorari* should only be allowed in cases where the fine was over five dollars, intended that in cases where the fine was under that sum the judgment should be final. Surely, it did not contemplate that the simple and plain way of correcting the mistakes of a false judgment by appeal should be taken away and a writ of prohibition substituted in its stead. In denying the appeal in such cases, the law in effect declared that the judgment of the mayor should be final. It is competent to the legislature to make such a judgment final, and having done so, it is the duty of the courts to respect their will. This being so, it is unnecessary to determine whether fresh fish is wild game, or whether the mayor exceeded his authority in punishing the plaintiff for purchasing fresh fish out of the market place during market hours. But we can not understand how the mayor can be said to have exceeded his jurisdiction. If the fine had exceeded five dollars, it is not denied but that the party might have appealed. This shows that an appeal was the appropriate remedy for correcting the false judgment of the mayor, and the appeal being denied by law shows that the general assembly designed that in this case his judgment should be final. It is hard to conceive how the question of jurisdiction can be made to depend on the fact whether the judgment was right or wrong. The mayor unquestionably had authority to decide whether the ordinance had been violated, and after he has determined it, how can it be said he had no jurisdiction? According to the argument, the court had to decide the case before its jurisdiction could be ascertained. If it was of opinion in favor of the plaintiff, it had jurisdiction; if of opinion against him, it had none. In the multiplied number of courts of limited jurisdiction in the English system of jurisprudence, whose powers are regulated by custom and prescription, instances may possibly be found which would warrant the application of the refinement indulged in by the plaintiff in the

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case before us; but none can be found, where the superintending court has interfered, where there was a clear intimation of an act of parliament that the judgment of the inferior should be final.

Judge Ewing concurring, judgment reversed.

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KLEIN & WIFE, Plaintiffs in Error, v. LAUDMAN & WIFE,  
Defendants in Error.

1. Though there is a presumption of law that a fact continuous in its nature, such as marriage, continues after its existence is once shown, yet this presumption should not be permitted to overthrow the presumption of law in favor of innocence.
2. A. and B. as husband and wife sued C. in an action of slander for words spoken. They proved their marriage. Declarations made by the wife of B., to the effect that previous to her marriage to A. she had been married in Germany to another man, were admitted in evidence in favor of C. to show the marriage with A. invalid. *Held*, that the law, under such circumstances, would presume in favor of the innocence of B. in contracting the second marriage, that the first marriage had been dissolved by death or decree of divorce.
3. *Quere*, whether the declarations of the wife would be admissible in such case to prove the former marriage.

*Error to Cooper Court of Common Pleas.*

This was an action by Leonard Klein and Margaret Klein his wife, against Jacob Laudman and Christina Laudman his wife, for slanderous words spoken of and concerning the plaintiff Margaret Klein. The defendants in their answer denied the speaking of the alleged words, and also stated that they had "no knowledge or information sufficient to enable them to form a belief whether the plaintiffs are husband and wife as alleged." At the trial the plaintiffs introduced in evidence a certificate of marriage showing that they had intermarried August 19, 1843. The slanderous words were also proven. The defendants introduced in evidence, against the objections of plaintiffs, declarations made by the plaintiff Margaret Klein, that, previous to her marriage with

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the plaintiff Leonard Klein, she had been married in Germany to another man. The plaintiffs offered to prove by parol evidence that said former marriage had been legally annulled and dissolved in Germany previous to the marriage of plaintiffs. The court refused to admit the testimony. The court gave the following instruction at the instance of defendants: "1. If the jury find from the evidence that the plaintiff Margaret Klein was married in Germany to another person than Leonard Klein, the plaintiff, then such relation is presumed to continue; and it devolves upon the plaintiffs to prove to the satisfaction of the jury that such marriage was legally terminated before the date of the marriage certificate, read in evidence, or they can not recover." Other instructions were given and refused. The jury found for defendants.

*Douglass & Hayden*, for plaintiffs in error.

I. The evidence of the former marriage of Margaret Klein was inadmissible. The pleadings presented no such issue. The answer does not specifically deny the fact that plaintiffs are husband and wife. If there was a misjoinder of parties, the defendants should have resorted to a plea in the nature of a plea in abatement. (1 Leigh, 64; 1 Chitt. Pl. 434-48, 742; 1 Bac. Abr. 19; 7 id. 541-548, 595.) It was overruled by pleading to the merits. (Stephen on Pl. 477; 1 Chitt. Pl. 426; 13 Mo. 547; 17 Mo. 345.) The evidence of a former marriage took plaintiffs completely by surprise. They came prepared to prove the issues. (See 1 Amer. Lea. Cas. 178; 16 Verm. 516; Voorhies' N. Y. Code, 195; 17 Mo. 360; 21 Mo. 432.) The first instruction given for the defendants should have been refused; it is erroneous. If evidence of the former marriage was admissible, then plaintiffs had a right to show by parol that said former marriage had been dissolved by divorce. The court erred in excluding the evidence offered. The judgment or decree of divorce, or a certified copy of it, could not be in the possession or power of plaintiffs. Nor is that judgment or decree, or a

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certified copy of it, legally attainable by them. (6 Pet. 352; 9 Mo. 443; 1 Greenl. Ev. § 82; 1 Pet. 591; 7 Pet. 99; 3 Monr. 532.)

*J. A. & J. H. Hening*, for defendants in error.

I. There was no error in admitting the evidence of a previous marriage. The defendants were bound to set up the former marriage in their answer. They could not separately plead the fact in abatement. (10 How. Prac. R. 40, 164; 5 Sandf. 210.) The court committed no error in refusing to permit plaintiffs to prove by parol a divorce in Germany. The record of the divorce should have been produced if any existed. (1 Greenl. Ev. § 514, 488; 2 Cranch, 238; 2 Wend. 411; 6 Wend. 475.)

NAPTON, Judge, delivered the opinion of the court.

We think the first instruction which the court gave, in this case, at the instance of the defendants, was erroneous. There was no presumption that a marriage, which was proved to have existed at one time in Germany, continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is, that the conduct of parties is in conformity to law, until the contrary is shown. That a fact, continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption, of equal if not greater force, in favor of innocence. The fact of a marriage in Germany, which was established in this case by the declarations of one of the plaintiffs, was entirely consistent with the validity of the marriage *de facto*, which, beyond all dispute, existed between the parties here, and after they had produced their marriage certificate, with proof of cohabitation as husband and wife since its date, the presumption was that this marriage was a lawful one, and that the former marriage in Germany, if any such was established, had been dissolved.

There was not any evidence in this case, so far as the bill



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of exceptions shows, that the first husband of Mrs. Klein was still living; but if this had been established, we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce, and that it was not incumbent on her, in this character of action and under the pleadings in this case, to produce a record of the judicial or legislative proceedings by which the divorce was effected.

It is not by any means clear that the declaration of the wife in this case ought to have been allowed. The general principles of public policy governing the relation of husband and wife do not permit the character or fortune or any other personal rights of the husband to be affected by such loose declarations of the wife as were in proof in this case. The existence of the wife is merged in that of her husband, so far as responsibility to third persons is concerned; and therefore what she does or says can not in general be used as evidence against him. There are, undoubtedly, exceptions to this rule, some of them growing out of the conduct of the husband in holding out his wife to the world as his agent, or in permitting her to act in certain respects as a *feme sole*; some based upon the necessity of the case, or springing from the paramount importance of affording protection to the wife even against the violence or injustice of the husband. But the present is not within any of these exceptions. There are cases of actions brought by husband and wife where the wife is the meritorious cause of action, in which her declarations have been allowed and properly. Thus, in a suit by husband and wife to recover compensation for services of the wife, her admissions of payment have been permitted, because the wife has been allowed to act either on her own account, or as a *quasi feme sole*, or as an agent of her husband. But such cases furnish no precedent for permitting a wife to criminate both her husband and herself. There can be no implication of any assent of the husband to any such declarations, and therefore no ground upon which they can be used against him.

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But conceding the competency of the declarations of Mrs. Klein, they did not make out any such *prima facie* case against the plaintiffs as to impose upon them the burden of producing positive proof of a legal and valid second marriage. We do not undertake to say what effect such testimony might have in a criminal prosecution for bigamy. That was not the case before the court. The suit was one for slander, and the answer of the defendants merely stated their ignorance as to whether the plaintiffs were married or not, and called for proof. That proof was given, *prima facie* proof of a valid marriage between the plaintiffs. The defendants then gave in evidence the declarations of the plaintiff, Mrs. Klein, that "previous to her marriage with the plaintiff, Leonard Klein, she had been married in Germany to another man." Surely there was nothing in this circumstance to create a presumption of bigamy. There was no proof that her first husband was living; and if there had been, the woman was still entitled to the charitable presumption that a divorce from her first husband had enabled her to marry a second time. But the court directed the jury to presume the invalidity of the second marriage, unless proof positive of a dissolution of the first was produced.

The other judges concurring in reversing the judgment, the case will be remanded.

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STEPHENS, Defendant in Error, v. FRAMPTON, Plaintiff in Error.

1. A. and B. were sued on a promissory note. It was not alleged in the petition that A. and B. were partners. B. put in a separate answer alleging that he was not a partner of A., and denying the execution of the note. The note was signed "A. & Co." The question whether B. was a partner of A. was submitted to the jury and they found for the plaintiff. *Held*, that B. was not aggrieved by the omission in the petition of the allegation that A. and B. were partners when the note was executed.
2. Amendments of pleadings with a view to make them conform to the facts in proof, should be liberally allowed in furtherance of justice where they can not operate as a surprise.

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*Error to Cooper Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Muir & Draffen*, for plaintiff in error.

I. The plaintiff must recover, if at all, upon the case made in his petition. This petition contains no allegation that defendants were partners when the note was executed. There was no such issue raised by the pleadings. The facts in evidence did not establish a partnership. The instructions given were erroneous.

*Stephens & Vest*, for defendant in error.

I. The only issue was as to the partnership. Frampton was a partner of Stephens. No objection was made at the trial to the evidence on the question of partnership. The issue was fairly tried. This court will not interfere. (7 Mo. 213; 13 Mo. 4; 18 Mo. 362; 6 Mo. 489; 9 Mo. 834; 16 Mo. 226; 18 Mo. 435.)

Scott, Judge, delivered the opinion of the court.

There was no objection to the instructions, nor was any point made on the rejection or admission of evidence in the court below. The case comes here on a question of variance or a defect in the pleadings. The suit is on a note and is signed "J. Law Stephens & Co." Frampton is sued with J. L. Stephens and he puts in a separate answer denying that he executed the note or that he ever was a partner of Stephens. The petition states that "defendants, by their promissory note, promised," &c. As the note is executed in a way that is usual with partners, and as the defendant put in his answer denying the partnership, we can not see how he is aggrieved by the action of the court below. But with all provisions in our code on the subject of amendments, is it not singular that the parties should come here complaining of such a defect as is made the foundation of this writ of

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error? An amendment here could not have operated as a surprise; it would have been granted, of course and it is strange that it was not made.

Judgment affirmed; the other judges concur.



THE STATE, Respondent, v. SCHRICKER, Appellant.

1. The twenty-fifth section of the fourth article of the act regulating practice in criminal cases, (R. C. 1855, p. 1176,) which prescribes that if a defendant be indicted by a wrong name, and he does not declare his true name before pleading, he shall be proceeded against by the name in the indictment; if he allege that another name is his true name, it must be entered on the minutes of the court, and after such entry the trial and all other proceedings shall be had against him by that name, referring also to that name by which he is indicted, &c.—is constitutional.

*Appeal from Moniteau Circuit Court.*

The defendant was indicted by the name of William Shucker. He appeared and pleaded that his name was William Schricker, and prayed to be discharged. The court, at the instance of the circuit attorney, entered the name of William Schricker on the minutes of the court and the trial proceeded against him according to the provisions of the twenty-fifth section of article four of the act regulating practice in criminal cases. He was convicted.

*Gardenhire*, for appellant.

- I. The twenty-fifth section of the fourth article of the act concerning criminal practice is unconstitutional. The court erred in putting defendant upon his trial by virtue of its provisions. (See *State v. Moore*, Walker, 134; *Ervine's Appeal*, 16 Penn. State, 256; *Campbell v. The State*, 11 Geo. 353.) It is a violation of the fourteenth clause of the thirteenth article of the constitution of Missouri. If it be constitutional, it subjects every citizen of the state to be put upon his trial for any offence for which an indictment may

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be pending in his county ; in fact for all of them, if the sheriff should serve writs upon all of them. A sheriff's service is substituted for an indictment.

*Knott*, (attorney general,) for the State.

I. The section called in question is constitutional. (7 Pet. 247 ; 8 Verm. 63 ; Ky. Code, p. 269, § 124, 172, 175, 279, 280 ; 2 R. C. Indiana, p. 374, § 99, 100 ; Texas Code, p. 96, 94, § 469 ; State v. Manning, 14 Texas, 405.)

Scorr, Judge, delivered the opinion of the court.

The defendant was indicted for selling intoxicating liquors without license by the name of William Shucker. He pleaded the misnomer in abatement. Thereupon the court proceeded as directed in the twenty-fifth section of the fourth article of the act regulating criminal practice, which prescribes that, "if a defendant be indicted by a wrong name, unless he declare his true name before pleading, he shall be proceeded against by the name in the indictment. If he allege that another name is his true name, it must be entered on the minutes of the court ; and after such entry, the trial and all other proceedings on the indictment shall be had against him by that name, referring also to the name by which he is indicted, in the same manner in all respects, and with the same consequences, as if he had been indicted by his true name."

It was maintained for the defendant that the foregoing section is in conflict with the provision of the constitution of the United States and of this state, which protects persons from prosecutions for offences of a certain grade unless by way of indictment. The restrictions imposed by the amendments to the constitution of the United States operate on the powers of the general government alone. It has been settled that they do not restrain the powers of the state governments. (*Barron v. City of Baltimore*, 7 Peters, —.)

But we can not see how the provision of the statute under

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consideration conflicts with the right of individuals to be free from summary prosecutions for indictable offences. The law prosecutes the person of the offender, being satisfied that when the party really guilty is made to suffer there can be no great evil in misnaming him. The idea of the counsel is founded on a misconception of the nature of a plea of misnomer. It does not deny the identity of the person of the offender, but admits that he is the person indicted but by a wrong name. A plea denying the identity of the person would amount to the general issue. We can not see how the party would be affected unconstitutionally if the law had required the plea of misnomer to be disregarded. The taking away the benefit of a plea of misnomer does not increase the danger of unfounded prosecutions. An innocent person can defend himself under a plea of misnomer but temporarily. If he escapes from one indictment, he may be indicted again by his true name; so that if he is not guilty, the only defence is on the merits. This was so before the statute altered the common law.

Judgment affirmed; Judge Ewing not sitting.

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STATE, TO USE OF HOWARD'S ADMINISTRATORS, Defendants in Error, v. ROLLINS *et al.*, Plaintiffs in Error.

1. Where a county collector advances to the treasury the whole amount of taxes chargeable against him as collector, and dies before the expiration of his term of office with a portion of the taxes delinquent, his successor in office is not bound, in his official capacity as collector, to collect such delinquent taxes for the benefit of the representatives of the deceased collector. He could not be held liable on his official bond for collecting and not paying over such delinquent list. If he should collect the delinquent list of his deceased predecessor, it would be as agent and not in his official capacity as collector.
2. The representatives of a deceased collector, who had made an advance of the taxes to the treasury, have a lien for the delinquent taxes, as provided by the fifty-fifth section of the third article of the revenue act of November 23, 1857. (Sess. Acts, 1857, Adj. Sess. p. 91.)



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*Error to Moniteau Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Parsons & Ewing*, for plaintiffs in error.

I. The court erred in overruling the demurrer. Howard, having paid the tax of the state, was substituted in place of the state, and had a year from that time to collect the money in. He was collecting for himself, not for the state; he was not accountable to the state for what he collected. His legal representatives were entitled to the same as assets of his estate. They had a right to employ agents to collect the same. They authorized Rollins to collect the unpaid taxes. Howard's administrators have a right to sue. But the collector and his securities are responsible on his official bond only for his official acts. This suit is on the bond. It can not be maintained.

*Douglass & Hayden*, for defendants in error.

I. Rollins, as collector, was entitled to the possession of the tax-book. The administrators of the deceased collector were compelled by law to hand over the tax-book at once to the successor. It being in the legal possession of Rollins, the administrators of the deceased collector could not collect the taxes. The law, then, contemplates that the successor of a deceased collector shall collect the taxes advanced to the state treasury. The law requiring him to collect, he is responsible on his official bond if he fail to pay them over to the persons entitled to receive them. The taxes were collected by Rollins *colore officii*. (24 Mo. 552; 13 Mo. 437; 11 Mo. 447; 17 Mo. 486.)

EWING, Judge, delivered the opinion of the court.

This was an action against Rollins and his sureties on his official bond as collector of Moniteau county. The petition alleges that Howard, the predecessor in office of Rollins, was elected in 1856, and died in February, 1858, having paid

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to the state, in December preceding, the whole amount of revenue with which he stood charged—the amount so paid having been advanced by him, for which he had the statutory lien on the property chargeable with the taxes; that Rollins was appointed in March, 1858, to fill the vacancy, to whom plaintiffs shortly thereafter delivered the tax-book which had been received by his intestate, showing the sum of \$1,075.46 uncollected state taxes, who executed his receipts therefor. The petition then avers the collection of the taxes by Rollins and a breach of his bond in the usual form, in failing to pay the same to plaintiffs. There was a demurrer to the petition, which being overruled, defendants filed their answer, to which there was a replication; whereupon there was a trial by a jury, and verdict and judgment for plaintiffs. Motions for new trial and in arrest of judgment being overruled, defendant brings the cause here by writ of error.

The only material inquiry arising upon the record is whether, upon the state of facts set forth, the petition shows any cause of action, and whether the court erred in overruling the demurrer. To sustain the petition we are cited to certain provisions of the revenue law which require the legal representatives of a deceased collector to hand over to his successor the tax-book in certain cases. (Acts 1857, Adj. Sess. p. 101, art. 6.) The fifth section provides that when any collector shall die after he has received the tax-book for any year, his legal representatives shall hand over at once to his successor, as soon as he is appointed and qualified, the tax-book, and shall also pay over at once out of the estate all moneys which have been collected by the deceased collector, and in his hand. The sixth section requires receipts to be executed by the new collector for the tax-book and for the amount of taxes collected by the deceased collector, one of which is to be delivered to the executor or administrator of the deceased collector, another to be filed with the clerk of the county court, and the third to be certified by the clerk to the auditor, who shall charge the new collector

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with the balance of the state taxes due on the tax-book. Section 55 of the third article says that every collector, who shall pay into the treasury the full amount of the state tax on the book on or before the day prescribed, shall have the same lien upon the property chargeable with the taxes advanced by him as the state would have if the taxes remained unpaid, and may proceed to collect the same for one year after such payment into the treasury in the same manner as other taxes are collected, notwithstanding the appointment of another collector. (p. 91.)

Was it the duty of the new collector Rollins to proceed and collect the taxes, the whole amount of revenue due the state having been paid by his predecessor before his death and the delivery of the books to him? If it was, then the averments of the petition show a good cause of action against him and his sureties. It is conceded that there was nothing due the state, and that if there was any cause of action it was in favor of the legal representatives of the former collector alone; and it is contended that a lien in such cases is given to the representatives of the deceased collector in consideration of the revenue having been paid out of his private funds, and that it becomes a part of the official duty of the new collector, under the law, to collect these taxes for the benefit of his predecessor's estate. I do not think this view is sustained by the provisions of the statute to which we have been referred. This lien is given, in all cases, as well to collectors whose terms of office expire by limitation, as to the representatives of those dying before the expiration of the term. And it is obvious and could not be pretended that in the former class of cases the new collector and his sureties would be liable on his bond or otherwise for any unpaid balance of taxes that might be due his predecessor. The tax-books need not and are never in such cases delivered to the new officer *as such*. If he takes them at all, it is as a matter of private arrangement, and in doing so acts merely as the agent of the former collector for whom he undertakes to collect the unpaid taxes for a stipulated compensation, as he

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would in any other private transaction. He is not the agent or officer of the state. He performs no duty as an officer, because the state has no interest in the matter, and does not require him to collect the debts of her citizens in which she has no concern. There being no duty, there arises no obligation or liability.

The judgment is reversed; the other judges concurring.

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DUTCHER, Defendant in Error, v. HILL, Plaintiff in Error.

1. In proceedings under the act relating to insane persons to subject the person and estate of an alleged lunatic to control of a guardian and the county court, the alleged insane person should have notice of the proceedings, or the county court should cause him to be brought before the court, or it should appear upon the record of such proceedings why such notice was not given or such attendance required.
2. Where a guardian of an insane person has been appointed by a county court, and the guardian has under the sanction of the court sold the land of such insane person, the validity of this sale can not be called in question in a collateral proceeding on the ground that notice of the inquisition was not given to the alleged lunatic.
3. Where a guardian of an insane person has been appointed by the county court, and the lunatic afterwards applies to the court to be relieved from the custody of the guardian on the ground that he has been restored to reason, this will be taken as an admission that the proceedings against him were valid, and he can not afterwards object in a collateral proceeding that the inquisition was irregular and void for want of notice to him.

*Error to Moniteau Circuit Court.*

This was an action in the nature of an action in ejectment for the possession of certain lands in Moniteau county. The plaintiff is Charles Dutcher. The defendant claimed title by virtue of a deed executed by one Reuben Dutcher as guardian of the plaintiff. The defendant read in evidence the proceedings of the county court upon the inquisition into the sanity of the plaintiff, and the sale of the land. It did not appear that Charles Dutcher had notice of the inquisition. In all other respects the proceedings were regular, and the

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sale was regular and had the sanction of the county court. It was in evidence that after this sale and before the institution of this suit, Charles Dutcher, the plaintiff, had in due form of law been declared of sound mind, and restored to the management of his own affairs.

The defendant asked the court to give the following declaration of law: "Although the plaintiff may not have had notice of the proceedings had in the probate court of Moniteau county, by which he was declared of unsound mind and incapable of managing his own affairs, still, if said proceedings were regular in all other respects, the finding of the court ought to be for the defendant." The court refused so to declare; there were no other instructions asked. The court found a verdict for the plaintiff.

*Parsons*, for plaintiff in error.

I. No notice was required. (1 Ashm. 82; Southcote's case, 1 Ambl. 112; *Ex parte* Hall, 7 Ves. 264.) The court should have given the instruction asked.

*Ross & Ewing*, for defendant in error.

I. The proceedings declaring Charles Dutcher an insane person are void for want of jurisdiction. There was no notice given. Notice must be given in all judicial proceedings. (See Blackwell on Tax Titles, 251.) The notice must appear by the record. (20 Mo. 238; 14 Mo. 83; 7 Mo. 463.) The validity of the proceedings can be questioned collaterally. (10 Mo. 771; 1 Burr. 447; 3 Denio, 595; 3 Ala. 287; 2 Engl. 390; 15 Wend. 374.) The court properly refused the instruction. (See *Eddy v. The People*, 15 Ill. 386; *Chase v. Hathaway*, 14 Mass. 222; 1 Barb. Ch. 39; 2 Hoffm. Ch. Pr. 253; 4 Mason, 121.)

SCOTT, Judge, delivered the opinion of the court.

The plaintiff was found to be a lunatic under the statute concerning insane persons. A guardian was thereupon appointed for his person and estate, who, proceeding in con-

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formity to law, procured an order for the sale of the real estate of the lunatic for the payment of his debts. His land was accordingly sold and conveyed by the guardian, whose proceedings were approved. This suit is brought by the lunatic to recover a portion of the land thus sold. It is an action of ejectment, and is founded on the ground that there was no notice to the lunatic of the inquisition by which he was found such.

The statute is silent on the subject of notice to the lunatic; but directs that, in proceedings under it, the county court may, in its discretion, cause the person alleged to be of unsound mind to be brought before the court. Whether this provision is a substitute for the notice and was designed to leave it to the discretion of the court whether the alleged lunatic should have notice and should be present at the making of the inquisition, we will not determine, as on any construction of the statute we are of opinion it should appear from the proceedings why the notice was not given, or the attendance of the person of unsound mind required. On general principles, persons should have notice of proceedings in courts by which their rights are to be affected, otherwise those proceedings will not bind them. Judgments rendered without notice are not binding. If the regularity of these proceedings had been questioned in a direct proceeding, no doubt it should have been corrected; but after considerable examination we have not been able to find a single case in which it has been held that the validity of a sale of the land of a supposed lunatic made by his guardian can be attached in a collateral proceeding on the ground of the want of notice of taking the inquisition by which the supposed lunatic was found to be such. The cases of *Willis v. Willis*, 12 Penn. State, 159, and of *Bethea v. McLemon*, 1 Iredell, 523, on the contrary, maintain that the want of such notice can not be taken advantage of in a collateral action. These cases do not appear to have been determined with reference to the local laws of those states, but on general principles. This case is an attempt to carry further the



principle, that a judgment against a party without notice is void. Here an irregularity occurred in appointing an agent, trustee, or officer, of which advantage might be taken by appeal or writ of error. After his appointment, the agent instituted proceedings in conformity to law to have an estate sold, which was sold accordingly. Now the party affected by the improper appointment of the agent would have the proceeding for the sale of the land declared null and void, to the injury of an innocent purchaser, although that proceeding in itself is all regular, and its imperfection grows out of a matter entirely collateral to it.

The proceedings under the law concerning insane persons are not like a final judgment, which is unalterable after the end of the term at which it was rendered. They are *in fieri*, like a cause pending; and irregularities in them, or defects of the record, may be obviated at any time so long as the lunatic is under the control of the guardian appointed for him. It was competent to the court to discharge the lunatic at any time from the care and custody of his guardian, so soon as it was informed of the irregularity of the proceeding. If, instead of demanding to have the proceedings set aside by reason of their irregularity, by which the record might have been amended so as to show that there was no cause of complaint, the plaintiff came into court and asked to be relieved from the custody of the guardian appointed for him on the ground that he had been restored to his reason, he thereby made a solemn admission of record that the proceedings against him were valid, and he should not now be permitted to say that they were otherwise, and thus take advantage of his neglect to object to the proceedings, when, if the objection had been made, the record might have been amended so as to remove the ground of his complaint. And this argument answers the objection that the plaintiff had no notice of the proceedings so that he could not appeal or take a writ of error. For, although he did not appear until after the land had been sold, yet, when he did appear, he acknowledged the validity of the proceedings under which it was

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sold ; and having obtained the advantage he proposed by this admission, he should not now be permitted to retract it, to the prejudice of an innocent purchaser.

If all the proceedings in relation to the lunatic are looked upon as composing one record, as they should be, we can not say that upon that record the plaintiff can now sustain an objection to the regularity of the inquisition.

Judgment reversed.

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HAM, Plaintiff in Error, v. HILL, *et al.*, Defendants in Error.

1. A. and B. were partners. A., transferring his interest to B. and retiring from the firm, took from the latter a bond of which the following is the condition : "Whereas the said B. having purchased the interest of the said A. in the firm of 'A & B.' in the carriage business in the city of B., Mo., and has agreed with the said A. to assume all partnership liabilities of said firm incurred between April 1, 1858, and July 1, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm ; now if the said B. shall observe and keep said agreement and pay said debts in manner and form above prescribed, then this bond to be void, otherwise to remain in full force and virtue." *Held*, that this was not merely a bond of indemnity to A. ; that the obligation thereby created was not contingent upon A.'s being compelled to pay, or his actually paying, to the creditors of the firm the debts embraced within the bond ; that a right of action on the bond accrued to A. so soon as B. failed to pay those debts on demand of the creditors.
2. The measure of damages in such case, it seems, would be the amount of the debts provided for in the bond ; upon a proper showing, however, the court might give judgment in such form as would make the defendant safe in paying the judgment.

*Error to Cooper Circuit Court.*

The following is the entire bond sued upon : "Know all men by these presents, that we, John H. Hill, as principal, and William B. Short and George Stucker, as securities, are held and firmly bound unto James R. Ham in the just and full sum of fifteen hundred dollars, for the just and full payment whereof we bind ourselves, our heirs, administrators

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and assigns firmly by these presents. Upon condition, however, that, whereas, said John H. Hill having purchased the interest of the said James R. Ham, in the firm of Ham & Hill, in the carriage business, in the city of Boonville, Missouri, and has agreed with the said Ham to assume all partnership liabilities of the said firm incurred between the first day of April, 1858, and the first day of July, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm; now if the said Hill shall observe said agreement and pay said debts in manner and form above prescribed, then this bond to be void, otherwise to remain in full force and virtue. Witness our hands and seals this 5th day of July, 1858. [Signed] John H. Hill (seal), Wm. B. Short (seal), George Stucker (seal.)”

The debts with respect to which defendant was alleged to be in default amounted, as set forth in the petition, to \$495.67 and interest. Plaintiff claims damages to the amount of six hundred dollars.

*Stephens & Vest*, for plaintiff in error.

I. The bond sued is not a bond of indemnity. It is a bond to do a specific thing, that is, to pay certain debts of the firm of Ham & Hill. The failure of defendant to pay these debts, when payment thereof was legally demanded, was a breach of the bond, and entitled plaintiff to his action. (See 5 Johns. 42; 20 Johns. 161; 3 Cow. 332; 16 Pick. 241; 26 Verm. 61.)

II. The plaintiff can recover not only nominal damages but the full amount of the debts which defendant failed to pay. (See Sedgwick on Dam. 321; Post v. Jackson, 17 Johns. 238; Thomas v. Allen, 1 Hill, 145; 17 Johns. 479; 7 Wend. 499; 7 B. Monroe, 307; 3 Bibb, 197; 7 Dana, 170; 15 Wend. 503; 9 Mees. & W. 656; 8 Mod. 33; 7 T. R. 97.)

*Douglass & Hayden*, for defendants in error.

I. The bond sued on was a bond of indemnity. It was given to protect the obligee against the payment of the part-

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nership debts. It was for the benefit and protection of the plaintiff alone. It did not affect the liability of either partner to the creditors of the firm. It did not release plaintiff from existing liabilities, nor, so far as creditors are concerned, did it add to the obligation of Hill to pay them. The true sense and meaning of the bond was to save plaintiff harmless. (See *Harcastle v. Hickman*, 26 Mo. 475.) The petition states that Hill has refused to pay. Why has he refused? It may be that the notes were fraudulently obtained or there was a failure of consideration, or that he had a set-off. If he has such a defence, shall he not have an opportunity to establish it? If plaintiff recovers, he may appropriate the money to his own purposes, and leave the partnership debts unpaid. If he be insolvent, the creditors can not coerce the money from him. Defendant may be compelled to pay the debts twice. A recovery by plaintiff would impair defendant's ability to pay the creditors.

II. The bond is a penal bond, but the penalty is not the measure of damages. The obligee can recover only such damages as he has actually sustained—actual compensation for positive loss. (Sedgw. on Dam. —.) The only way in which plaintiff can show that he has sustained loss is by showing that he has been compelled to pay the debts provided for in the bond, or a portion of them. The measure of damages will be the amount so paid. There is no cause of action. There is no averment of payment, and he must pay to recover. The demurrer was properly sustained. (10 Mo. 19; 17 Mo. 41; 15 Mo. 421.)

EWING, Judge, delivered the opinion of the court.

This was an action on a bond executed by the defendant Hill to the plaintiff—who had been copartners in the carriage business—containing the following condition: "That whereas the said John H. Hill having purchased the interest of the said James R. Ham, in the firm of Ham & Hill, in the carriage business, in the city of Boonville, Missouri, and has agreed with the said Ham to assume all partnership liabili-

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ties of the said firm incurred between the 1st day of April, 1858, and the 1st day of July, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm : Now if the said Hill shall observe and keep said agreement and pay said debts in manner and form above prescribed, then this bond to be void, otherwise to remain in full force." The petition alleges, as breaches of said bond, the failure of the defendant to pay certain debts of the firm, which are particularly specified in the petition, accruing within the period mentioned in the bond, payment of which had been legally demanded ; and that suit had been brought against the plaintiff by the creditors of the firm to recover said debts. There was a demurrer to the petition, which being sustained, the cause is brought to this court by writ of error.

The question for our consideration is whether a right of action accrued on the bond upon the failure of the defendant to pay the debts it provides for according to its stipulation ; or is it a bond of indemnity merely ? We think it is clearly to be collected from the terms of the instrument in suit that it was not the intention merely to secure the plaintiff against actual loss or damage, or that it created an obligation which was contingent upon the payment by the plaintiff of the debts it provides for. It is a bond with an affirmative covenant to do a certain thing ; the defendant thereby bound himself to take the place individually of the firm, and discharge debts for which it was liable, and which, as it respects the parties themselves, became by the bond the individual debts of the defendant. Although the legal liability of the firm to its creditors is not changed by the instrument, yet, as to these firm debts, it creates the relation of creditor and debtor between the plaintiff and defendant, and the assumption by the defendant is equivalent to a direct promise to pay money to the plaintiff. In promising to pay debts for which as a firm they were jointly liable, the defendant thereby incurred an obligation which was violated, and for which a right of action accrued to the plaintiff when he failed to pay them

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on demand of the creditors. If A. for a sufficient consideration enter into a covenant with B. to pay the creditor of B. a given sum at a specified time or when it should be legally demanded, there could be no doubt of the meaning and legal effect of such an instrument, and that the default of A. to pay at the time agreed upon would give B. an immediate right of action, without waiting until he had made payment of the debt. The case before us and the one supposed are not distinguishable. In the former, the obligor assumes, for the consideration therein expressed, all the partnership debts accruing within a given period, and expressly agrees to pay them whenever payment is legally demanded.

The distinction between bonds of indemnity and covenants to perform a particular act, is well illustrated by the authorities cited by counsel for the plaintiff, and fully sustain our view of the nature and effect of the covenant in this case. In the case of *Holme v. Rhodes*, 1 Bos. & Pul. 640, the suit was on a bond with a condition that the obligor, who was principal on an obligation to pay money to a third person in which the obligee was surety, should pay the debt by a certain time and thereby acquit the obligee; the defendant pleaded *non damnificatus*. This plea was held to be no answer to that part of the condition by which the defendant undertook to pay the sum for which the obligee was bound. In a note to *Cutter v. Southern*, 1 Saund. 117, Sergeant Williams states the rule to be, that in all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*. This plea, however, can not be pleaded, where the condition is to discharge or acquit the plaintiff, for there the defendant must set forth the special manner of performance. But it is otherwise where the condition is to *acquit* plaintiff from any damage by reason of such bond or other particular thing, for that is in truth the same thing as with a condition to indemnify and save harmless. *Loosemore v. Radford*, 9 M. & W. 656, is an instance of the application of the principle in a suit by a surety against the principal on his cove-



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nant to pay the amount for which they were jointly liable on a given day, in which it was held that the right of action accrued on default of paying at the specified time and for the full amount. *Post v. Jackson*, 17 John. 238, which was affirmed on error (ib. 480) sustains the view we have taken of the instrument sued on, both as it respects plaintiff's right of action upon it before payment of the debts, and also as to the rule of damages he contends for. In that case the plaintiff was a lessee of certain premises and had covenanted to pay the rent; he assigned to the defendant, who covenanted with the plaintiff that he (defendant) would perform the plaintiff's covenants in the original lease to him. The averment was that rent of a given amount was in arrear and due and unpaid to the original lessee. The covenant was held not to be a mere covenant of indemnity. The Chancellor drew a distinction between an undertaking to acquit and discharge *from any damage* by reason of the bond and a covenant to do an act in discharge of the plaintiff from such bond or covenant, and remarks that it would be a perversion of the plain sense and language of the covenant in that case to turn it into a mere covenant to indemnify.

In *Thomas v. Allen*, 1 Hill, 146, the principle of *Post v. Jackson* is recognized and applied to a case where a bond was given conditioned to pay plaintiff a sum of money by satisfying a bond and mortgage executed between three persons, and to save the plaintiff harmless. The breach assigned was that the sum agreed to be paid was due and payable on a specified day on the bond and mortgage, and that the defendant had not paid or satisfied the same. On a demurrer that this was a bond of indemnity and that the breach did not show the plaintiff to have been damnified, it was held that the instrument was more than a bond of indemnity and that the breach was well assigned by showing that the debt was not paid at the day. In the matter of *Negus*, 7 Wend. 503, there was a covenant among others by one partner to another to pay the debts of the firm, and also to indemnify

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the obligee. In answer to the objection that it was simply a bond of indemnity and that therefore the obligee must have shown that he had been damnified by the payment of debts which the obligor assumed to pay, the court observes that, although a covenant to indemnify followed the covenant to pay the debt, it did not alter the force and effect of the proceeding; that the covenant to pay the debts was an affirmative covenant to do a certain thing—to pay certain sums of money, and that it was no defence to the action to say the plaintiff had not been damnified. If the condition of the bond stipulates for the performance of any particular act, performance of that act must be averred, and in an action on such a bond *non damnificatus* is not a good plea. (Combs v. Newton, 4 Black. 121; 20 John. 161; see also Woods v. Rowan & Coon, 5 Johns. 43; 3 Cowen, 332.)

As to the measure of damages in this case, if the plaintiff is entitled to recover, we see no reason why he should not recover the sum due by the bond. Of course, if the bond has been paid in part, or otherwise satisfied, the defendant will be entitled to the benefit of such payment or satisfaction. The presumption is that the plaintiff gave full consideration for the bond, and if it is not discharged the defendant should pay the amount of it. The defendant being a copartner and liable to partnership creditors, notwithstanding his bond to the plaintiff, if the situation of the plaintiff is such or if there are any circumstances that would make it just to do so, the court, on the trial, would, in rendering judgment, see that the defendant was made safe in paying the judgment; or it might be a ground for an injunction and relief in equity.

The judgment will be reversed and the cause remanded; the other judges concurring.

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Mahan v. Scruggs.

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**MAHAN, Plaintiff in Error, v. SCRUGGS, Defendant in Error.**

1. If the defendant in an execution, a head of a family, have none of the articles of property enumerated in the first and second clauses of the twelfth section of the act regulating executions, (R. C. 1855, p. 738,) he may select and hold exempt from execution, under the thirteenth section of said act, any other property not exceeding in value one hundred and fifty dollars.
2. If he have a portion only of the articles enumerated in said first and second clauses of the twelfth section of said act, he may select them as exempt under the twelfth section, and he may also, under the thirteenth section, select, in addition, other property, which, together with that selected under the twelfth section, will not exceed in value one hundred and fifty dollars.

*Error to Cole Circuit Court.*

This was an action to recover damages against a constable for failing to make the money on an execution. Mahan, the plaintiff in this suit, obtained a judgment against one Williams. Upon this about sixty dollars were due. The constable garnished a debt due Williams for eighty dollars. He also levied upon a horse valued at sixty dollars, and some other personal property, all of which, including the horse when appraised, did not amount in value to one hundred and fifty dollars. The constable advised Williams that he had a right to elect and take property of the value of one hundred and fifty dollars. Whereupon he demanded and received of the constable the debt garnished, the horse and the remainder of the personal property, all of which, as appraised, amounted in value to less than one hundred and fifty dollars. The court refused to declare the law, as requested by the plaintiff, as follows: "Under the act concerning executions, the defendant in the execution could not hold and claim exempt from execution his horse and also the debt that was garnished." The court found and rendered judgment for the defendant.

*White*, for plaintiff in error.

I. The court erred in refusing the instruction asked and in rendering judgment for defendant. A party must give

up all the articles mentioned in the first and second subdivisions of the twelfth section if he wishes to take advantage of the thirteenth section.

*Parsons*, for defendant in error.

I. The instruction was properly refused. Williams had the right to select and hold the horse and money garnished exempt from execution. The defendant in an execution has the right to select property under the twelfth section, and if it does not amount to one hundred and fifty dollars in value, he may select and make up the deficit under the thirteenth section.

NAPTON, Judge, delivered the opinion of the court.

The case turned altogether upon the construction of the twelfth and thirteenth sections of the act concerning executions.

The last eight clauses in the twelfth section provide for exemptions which are independent of circumstances, and present no difficulties of construction. The first two clauses exempt ten hogs, ten sheep, two cows and calves, one plough, &c., and work animals to the value of sixty-five dollars. Then the thirteenth section provides that in lieu of the property mentioned in these two clauses, the defendant may select "any other property, real, personal or mixed, or debts and wages not exceeding in value one hundred and fifty dollars."

Where the defendant does not select any of the articles enumerated in the two clauses of the twelfth section just referred to, it is plain that, under the thirteenth section, he may select other property to the value of one hundred and fifty dollars. So far as this is concerned, there could be no difference of opinion; but if the defendant selects any one of the articles enumerated in the two first clauses of the twelfth section, the question is, whether that debars him from any benefit of the thirteenth section. And this question, it must be acknowledged, is not so easy to answer, as the strict letter of the thirteenth section and the general

scope of the two sections do not altogether correspond. According to a literal construction of the thirteenth section, no provision is made for a case where the defendant retains a part only of the articles enumerated in the two first clauses of the twelfth section. When he selects all under the twelfth section he is clearly not entitled to any under the thirteenth, as the one is in lieu of the other.

But we think the equity of the law will reach a case like the present, and we believe the decision of the circuit court to be in conformity to the practical construction given to the law throughout the state. What motive could induce the legislature to diminish the amount of exempted property as the owner became poorer? We must consider the general policy of these laws. The law provides that if a defendant owns a horse worth sixty-five dollars, and ten sheep and ten hogs, and two cows and calves, and other specified property, altogether about of the value in money of one hundred and fifty dollars, he may retain all this property; or, if he has none of this enumerated property, and has other property or choses in action to the amount in value of one hundred and fifty dollars, he may retain the other property. In either of these cases, the law clearly allows him one hundred and fifty dollars in property, which the law specifies, or which he himself selects. But if the defendant has none of the property enumerated in the two clauses of the twelfth section, except a horse worth sixty-five dollars, and all his other property is less than the difference between sixty-five and one hundred and fifty dollars, was it the intention of the law to put the defendant to an election between the horse and the other non-enumerated property, when both together would fall short of the hundred and fifty dollars? It is not easy to see a motive for such a discrimination, and yet such would be the effect of the law if interpreted as the appellant insists on. Undoubtedly this is a literal interpretation of the law, but may we not apply the language of the thirteenth section *distributively* to each enumerated article of property as well as to all the property therein mentioned collectively?

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By so doing we conform to what we believe is the general understanding in the country, that one hundred and fifty dollars' worth of property is exempt from execution, in addition to the exemptions specifically mentioned in the eight latter clauses of the twelfth section; and this amount of property in value may be taken either by selecting the articles and stock enumerated in the first and second clauses of the twelfth section, or by taking one hundred and fifty dollars' worth of other property, or by taking such of the articles or stock specified in the first and second clauses of the twelfth section as he may have, and other property or choses in action not mentioned in these clauses, which, together with what has been selected under the twelfth section, will not exceed in value one hundred and fifty dollars. This construction of the act seems to promote the policy which the law has in view, although the third contingency above mentioned is not literally provided for. After some hesitation we have concluded that it is within the equity of the statute, and shall therefore affirm the judgment of the circuit court. The other judges concur.

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TURNER, Plaintiff in Error, v. FRANKLIN, Defendant in Error.

1. If a rate-bill and warrant issued by a board of school trustees under the twelfth subdivision of the fourth section of the fifth article of the act providing for the organization of schools (R. C. 1855, p. 1437) be regular and valid upon its face, the constable will be protected in executing it; he is not obliged to examine into the validity of those acts of the board of trustees upon the basis of which the warrant and rate-bill are issued.

*Error to Miller Circuit Court.*

This was an action originally commenced before a justice of the peace to recover damages for a wrongful levy upon and sale of a horse. The defendant justified the alleged trespass, setting up that he made the levy and sale under and by virtue of a warrant and rate-bill issued by a board of



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school trustees. The plaintiff offered to show that by agreement the property of certain persons was not taxed; that they voted for the levy of the tax. This was excluded. Plaintiff also offered to prove that notice of the meeting was not given as required by law; that a majority of the qualified voters in the district did not vote to levy the tax. This also was excluded. There was evidence tending to show that the defendant made a demand as constable of the tax levied against plaintiff.

The following instruction asked by the plaintiff was refused: "If the defendant only exhibited his rate-bill and did not demand the tax of the plaintiff, defendant could not lawfully sell said property under said rate-bill; and in the absence of such demand the jury will find for the plaintiff the value of his said mare."

The court, at the instance of the defendant, gave the following instruction: "If the jury find from the evidence that the defendant sold plaintiff's mare under and by virtue of the rate-bill read in evidence, and that before such levy and sale he demanded of the plaintiff the amount assessed against him, and plaintiff refused to pay the same, the jury will find for the defendant."

The plaintiff took a non-suit, with leave, &c.

*Parsons & Ewing*, for plaintiff in error.

I. The court erred in admitting the rate-bill and record of the trustees as evidence of the statements contained in them. The rate-bill was no legal authority like an execution. The law must be strictly complied with that authorizes the issuing of the rate-bill. The assessment and consequently the rate-bill is absolutely void, the law not having been complied with. The constable, the law not having been complied with, is liable as a trespasser. (*Sayre v. Tompkins*, 23 Mo. 445; *Atchison v. Amick*, 25 Mo. 407; R. C. 1855, p. 1436, § 4.) The court should have admitted the testimony offered by plaintiff tending to show that the law had not been complied with, and have granted the instruction asked. A pre-

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sentation of the rate-bill is not sufficient. (25 Mo. 407.) The court erred in giving the instruction asked. The rate-bill is not conclusive evidence of the statements in it, nor that the law has been complied with. No sufficient demand was proved.

NAPTON, Judge, delivered the opinion of the court.

The fourth section of the fifth article of the act regulating common schools, among other duties and powers entrusted to the trustees of a school district, requires them "to make out a rate-bill, containing the name of each person patronizing such school, and not exempted [from rate-bill,] and the amount for which such person is liable, adding thereto five cents on each dollar for collector's fees, and to annex thereto a warrant for the collection thereof, directed to the constable of the township, whose duty it shall be to receive and collect the same." The eighth section of the seventh article makes it the duty of the constable "to collect the amount, due on these rate-bills or warrants, from the persons against whom such warrants or rate-bills have been issued; and upon failure on the part of such persons to pay the amount so due, to levy upon the personal property of the person so failing or refusing to pay the amount so due, and the said constable shall proceed to sell the same," &c. (R. C. 1855, p. 1441.) The ninth section of the same article makes the constable and his securities liable, for any failure to execute or return these rate-bills, to the same extent and in the same manner "as though such warrant were an execution issued by a justice of the peace."

So far as the constables are concerned under this school law, their responsibility in reference to rate-bills or warrants is declared by the act to be precisely the same as the law already had fixed it in reference to executions issuing from justices' courts; and it would seem to be a natural consequence of this responsibility that the writ should protect them in their obedience to its mandates. There can be no question as to the executions, where they are valid on their

face. The officer has no right to look into the record of the suit or examine the validity of the judgment; his duty is simple obedience to the mandates of the writ, and if the writ on its face shows the jurisdiction of the court from which it is issued, the officer is protected in executing it.

We do not perceive, then, any thing to distinguish this case from one where the officer is sued for acting under an ordinary execution. It is not pretended that the legislature lack the power to declare a rate-bill or warrant to have the effect of an ordinary execution, and they have done so, except that the constable is not authorized to levy upon the property of the delinquent until a demand has been made of him for the amount and he has refused or failed to pay.

As to the demand and refusal in this case, there was ample evidence, and the question was left to the jury.

In relation to the testimony offered by the plaintiff which proposed to show that some of the preliminary steps required of the board of trustees had been neglected, we are unable to see its relevancy. If the suit was against the trustees, there might be some propriety in holding them responsible for any failure of theirs in complying with every material provision of the statute; but it would appear very unjust to visit their negligence upon the constable, whose business it is made to collect the warrant, and who has no means of ascertaining whether the trustees have, in all respects, done their duty or not.

Judgment affirmed; the other judges concur.



CHISM'S ADMINISTRATOR, Plaintiff in Error, v. WILLIAMS,  
Defendant in Error.

1. The words "die without issue" in a bequest of chattels, made in this state prior to 1845, when used alone as designating the contingency upon which a limitation over by way of executing a bequest is to take effect, mean an indefinite failure of issue, and the contingency consequently being too remote the limitation over by way of executory bequest is void.

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2. In order that other additional expressions in the will may override this well settled meaning of the words "die without issue," and make them mean a definite instead of an indefinite failure of issue, they must point incontestably and unequivocally to the death of the first taker as the period contemplated by the testator when the limitation over should take effect.
3. A testator dying in 1832 bequeathed to his daughter Charity a horse, saddle and bridle, feather bed, a cow and calf, and a female slave; the will contained this further provision: "But here be it fully understood, that if my daughter Charity should die without issue, then and in that case what I have willed and bequeathed to her, it is my will and pleasure that it be given by [my] executors to my daughter Mahala, to be enjoyed by her and her heirs forever." *Held*, that the limitation over by way of executory bequest was void as being upon a contingency too remote, an indefinite failure of issue.

*Error to Howard Circuit Court.*

This was an action for the possession of certain slaves. The plaintiff sues as administrator of Mahala Chism, deceased. At the trial, the plaintiff introduced in evidence the will of Colden Williams, deceased. This will contained the following clauses: "I will and bequeath to my daughter Charity a certain negro woman by the name of Chaney. I also will to my daughter Charity a horse, saddle and bridle, to be worth one hundred and ten dollars. I also will to my daughter Charity one of my feather beds and bed furniture, to be selected for her by my executors." "I also give my daughter Charity a cow and calf to be worth ten dollars; but here be it fully understood, that if my daughter Charity should die without issue, then and in that case what I have willed and bequeathed to her it is my will and pleasure that it be given by [my] executors to my daughter Mahala, to be enjoyed by her and her heirs forever." This will was published March 2, 1824. The testator died in 1832. His daughters Charity and Mahala survived him. Mahala married one Chism and died about 1840 or 1841, leaving her surviving a daughter and granddaughter. Charity died in January, 1858, without issue. Said slave Chaney died before said Charity. The slaves in controversy are her children.

The plaintiff asked the court to declare the law to be as

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follows: "The words 'should die without issue,' with the expressions and circumstances accompanying said words, used by Colden Williams, deceased, in the bequest by his will to his daughter Charity of the slave Chaney, mean issue living at the death of said Charity and not an indefinite failure of issue; and the limitation to his daughter Mahala is a legal and valid limitation; and by said bequest a life interest in said slave Chaney only passed to said Charity, and the absolute property in said slave Chaney vested in said Mahala; and the plaintiff is entitled to recover the possession of the offspring of said Chaney or their value, with interest on their value at six per cent. per annum from the institution of this suit down to the present time." The court refused so to declare, and found for defendant.

*Douglass & Hayden*, for plaintiff in error.

I. The simple limitation of the slave Chaney to Mahala, should Charity "die without issue," is a valid limitation and not repugnant to any rule of legal construction. The testator meant that Mahala should take the property after a definite and not an indefinite failure of issue. His *intention* alone is to govern. (See *Forth v. Chapman*, 1 P. Wms. 663; *Pleydell v. Pleydell*, 1 P. Wms. 749; *Pimbury v. Elkin*, id. 563; *Nichols v. Horper*, id. 199; *Target v. Gaunt*, id. 432; *Lyde v. Lyde*, 1 T. R. 593; *Goodtitle v. Peyton*, 2 T. R. 720; *Porter v. Bradley*, 3 T. R. 143; *Doe v. Perryn*, 3 T. R. 494; 7 T. R. 589; 3 J. J. Marsh. 89; *Moore v. Moore*, 12 B. Monr. 653; 4 Kent, 12, 13, 274, 281; *Cruise's Dig. tit. Estate Tail*, ch. 1, § 23, 27; 8 Mo. 1; 1 Dana, 235; 1 Terr. Laws Mo. p. 436; *Geyer's Dig.* 125; R. C. 1835, p. 119, § 5; R. C. 1845, p. 219, § 5; R. C. 1855, p. 355, § 5; *Dunn v. Bray*, 1 Call, 338; *Vaughn v. Guy*, 17 Mo. 429; *Dugan v. Livingston*, 15 Mo. 230; *Peters v. Carr*, 16 Mo. 54; *Bills v. Brown*, 2 Cro. 590; 2 Jarm. on Wills, 262.)

II. Should this court be inclined to follow the strict, rigid and unnatural rule of construction of the English courts, and the courts of those states where the statute *de donis* has

been adopted as part of their law of property, then, it is contended, there are sufficient additional expressions connected with the bequest to take the case out of that rule. The testator did not mean to convey the idea that his executors should live for an indefinite series of generations, and then that they should give Mahala the slave, the horse, saddle and bridle, the bed, and the cow and calf, and all to be enjoyed by her. Such a construction would be repugnant to common sense. The property bequeathed was perishable. Very slight circumstances should take the case out of the operation of the rigid rule. (See Kent Com. 282; 2 Jarm. on Wills, 317, 324; 1 P. Wms. 563; 3 P. Wms. 258; 2 T. R. 720; 3 T. R. 143; 7 T. R. 589; 1 Johns. 440; 12 Wheat. 153; Anderson v. Jackson, 16 Johns. 382; 10 Johns. 12; Brown P. C. 299; 2 Curt. C. C. 126; 18 How. 202; Halbert v. Halbert, 21 Mo. 283; 1 T. R. 593.) The *additional expressions and circumstances* connected with the bequest in this case, showing the intention of the testator, are not slight, but convincingly strong.

A. Leonard, for defendant in error.

I. In reference to the meaning of the words "die without issue," when used in limitations of property, the general rule is that in legal contemplation they import an indefinite failure of descendants, in wills as well as in deeds, and in reference to personal as well as to real property. (See *Beauclerc v. Dormer*, 3 Atk. 312; *Barlow v. Salter*, 17 Ves. 481; *Campbell v. Harding*, 2 Russ. & Myl. 402; *Bigge v. Bensley*, 1 Brown, C. C. 176; *Chandlers v. Price*, 3 Ves. 101; *Crowder v. Stone*, 3 Russ. 222; *Porter v. Ross*, 2 Jones N. C. Eq. 197; *Gray v. Gray*, 20 Geng. 804; *Moody v. Walker*, 3 Ark. 147; 4 Kent, Comm. 284, 294; *Vaughn v. Guy*, 17 Mo. 431; *Halbert v. Halbert*, 21 Mo. 278.)

II. In the present limitation there are no expressions or circumstances sufficient to show that the testator used the words in a sense different from that which the law imputes to them; in other words, there is nothing in the present



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case sufficient to take it out of the general rule. (See Barlow v. Salter, 17 Ves. 479; Down v. Penny, 1 Mer. 21; Keys v. Chatt. 138; Campbell v. Harding, 2 Russ. & My. 390; 7 T. R. 596; 1 P. Wms. 663, 198, 432, 534, 563; Prec. Ch. 528; 2 Ves. sr. 236.)

NAPTON, Judge, delivered the opinion of the court.

The only matter for consideration in this case is the construction of the will of Colden Williams, made in 1824, in which the testator gave to his daughter Charity a negro woman and some other personal property, and then declared: "But here be it fully understood, that if my daughter Charity should die without issue, then and in that case what I have willed and bequeathed to her, it is my will and pleasure that it should be given by [my] executors to my daughter Mahala, to be enjoyed by her and her heirs forever."

It may be considered as the settled law in England ever since the statute of Wills of 32 Hen. VIII, ch. 1, (1540) that a devise to one in fee, with a limitation over in the event of the first taker dying without issue or heirs of the body, creates an estate tail in the first devisee, and therefore the words "dying without issue" must mean an indefinite failure of issue. There is no conflict of authority in the English cases on this point so far as devises of real estate are concerned. Chancellor Kent says: "The series of cases in the English law have been uniform from the time of Year Books down to the present day, in the recognition of the rule of law that a devise in fee, with a remainder over, if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail; and the limitation over is void, by way of executory devise, as being too remote and founded on an indefinite failure of issue. This rule of construction, it may be added, has been generally adopted in the United States, and, unless it be in Kentucky, I am not aware that it has been entirely disregarded in any of the states."

This construction or interpretation of the words "dying without issue" was originally established by the statute *de*

*donis* (13 Edw. I, ch. 1, 1285) as applicable to deeds. Where the will of the donor was to be followed and subsequently to the passage of the statute of wills (32 Hen. VIII, ch. 1) it was applied to wills, where the will of the testator was the rule of construction. It may be considered a parliamentary interpretation of the words, professedly based upon a design to carry out the intent of the donor or testator, but really adopted to carry out the views of public policy indicated by the law of entails. It is an artificial interpretation of words contrary to their natural, vulgar and grammatical meaning, and, although the ingenuity of many able judges in England and of Chancellor Kent, in this country, has been exerted to support the rule, not merely as a fixed rule of law, settled by legislation and judicial precedent, but as really one having a tendency to promote the intention of testators and donors, the common sense of mankind seems to have revolted against the course of reasoning, and, both in England and in this country, legislative authority has interposed to restore the words to their natural meaning.

A distinction was taken in England between devises and bequests of personal property, or rather at first between devises of freehold estates and of terms for years. As terms for years and other chattels were not within the statute *de donis*, the policy of that statute did not render it necessary to give so unnatural and artificial a meaning to the words "dying without issue" when applied to this species of property, as had become their fixed interpretation when applied to freehold estates, capable of being entailed. A distinction was therefore attempted to be established in the case of *Firth v. Chapman*, 1 P. Wms. 663; and it was recognized and followed in several other cases. Chancellor Kent seems to think the distinction was quite a reasonable one, and might well have been maintained; (*Anderson v. Jackson*, 16 Johns. 409;) but, after a brief struggle for existence in England, it seems to have been gradually lost sight of, and to have ultimately amounted to this, that in wills of personal estate the courts would lay hold of very trivial expressions in the will

to take the case out of the rule. But the rule was conceded in *Beauclerc v. Dormer*, 2 Atk. 308, as applicable to both personal and real property, and in a number of cases following it, so that Chancellor Kent was of opinion, in 1819, when the case of *Anderson v. Jackson* was before the court of errors, that even then the great weight of authority was decidedly that the words "dying without issue," standing without other circumstances of intention, meant a general and indefinite failure of issue, and an executory bequest of personal property made after such contingency was void. There was, in truth, no foundation for the distinction, upon the hypothesis that the rule itself had been made to carry out the will of testators; for it was plain that when the testator, as was frequently the case, used the same words and applied them both to his real and personal estate, it was absurd to suppose he intended them in different senses in the same will. So long, then, as the courts had held that the words "dying without issue" imported an indefinite failure of issue, which it was necessary to hold in order to convert the first devise in fee into an estate tail, the only effect which an application of these words to personal property could reasonably have would be to leave the first estate an absolute fee; and then the rule which governed executory devises, even when a fee was limited in a fee that the estate over must vest within a life or lives in being and twenty-one years and a few months thereafter, would destroy the limitation over as completely and effectually as though the first estate given was an estate tail.

In the southern states of this Union, where these limitations occur so frequently in bequests of slaves, this distinction between real estate and chattels has not been followed or adopted; but the words "dying without issue," unless controlled by other words, have been uniformly construed an indefinite failure of issue. (*Hunter v. Haynes*, 1 Wash. 71; *Eldridge v. Fisher*, 1 Hen. & Munf. 559; *Daude v. Chaney*, 4 Harr. & McHen. 393; *Davidson v. Davidson*, 1 Hawks, 180; *Bryson v. Davidson*, 1 Murphy, 143; *Mullhens v.*

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Daniel, 1 Murphy, 4; Every v. Vernon, 1 Nott & McCord, 69; Keating v. Reynolds, 1 Bay, 80; Jones v. Rice, 3 De-paup. 165.)

Another distinction was taken in England in bequests of terms for years, between cases where an express estate tail was first created before the limitation over and those where only an implied estate tail would have been created, had the subject matter been real estate. But this distinction was abandoned, and it has been frequently held that the limitation of a term over, after a dying without issue, even in such cases where the limitation would only have given an estate tail by implication in a real estate, is to be taken in the legal sense of the expression, and therefore the limitation is void. (Fearne Ex. Dev. 233.) Nor does it make any difference whether the devise is to A. *for life* expressly, and if he die without issue, remainder over, or to A. indefinitely, and if he die without issue, remainder over. (Cruise Dig. tit. Devise, ch. 19, § 35, and cases there cited.)

The only question then, in this case, is whether there are any expressions in the will of C. Williams to take the case from the operation of this rule. The only expressions in this will to distinguish this from any other case, where there is a bequest over upon a dying without issue of the first taker, are the words "*then and in that case*" and the words "to be enjoyed by her." The direction to his executors to give the property to his daughter Mahala if his daughter Charity died without issue, can not be understood as having any influence upon the question of intent. There can be no doubt that it was the testator's intent that his daughter Mahala should have the property, in the event indicated, whether his executors were alive or not when that event occurred. Nor is there any thing in the words which declare that the property *was to be enjoyed by his daughter* Mahala, to show that the gift was intended as a personal bequest, inasmuch as the testator adds, that it is to be enjoyed by her and her heirs. This shows, beyond all doubt, that, whether Mahala was alive or not when the testator intended the estate to

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vest, was a matter which had no influence on his intended disposition; but he designed the property to vest absolutely in her and her heirs.

In relation to the words "then and in that event," the case of *Beauchlere v. Dormer*, 2 Atk. 311, is decisive as an English authority; nor can the case of *Wilkins v. South*, 7 Term. R. 555, be considered as conflicting with Lord Hardwick's construction of the word "then." In this last case, a leasehold was bequeathed to P. and the heirs of his body lawfully begotten and their heirs and assigns forever; but in default of such issue, "then after his decease" to go over. Lord Kenyon considered the words "*then* after his decease" as clearly pointing to the death of P. as the time when the estate would vest.

The case of *Bryson and others v. Davidson*, 1 Murphy, 143, is like the present in more than one respect, but in regard to the use of these words "*then and in that case*" it is identically the same. There a testator bequeathed to his daughter a negro woman and child, and land and household furniture, and declared that "if she died without having heirs, *then and in that case*" the property to be divided between the testator's nephews, &c. The limitation over was held void, although in the argument great stress was laid on the words "then and in that case;" and the authority of *Weekly v. Rugg*, 7 Term R. 322, was invoked. The case of *Matthews' Adm'r v. Daniel*, 1 Murphy, 42, is a case still stronger as showing the adherence of the supreme court of North Carolina to the rule under circumstances where the nature of the property would necessarily require the limitation to vest within a life in being. This was a bequest of a "negro fellow named Bob and a bay horse" to the testator's daughter, and "if she should depart this life without heir lawfully begotten of her body, the said negro and horse should belong to another." The court said the limitation was too remote and that the absolute property vested in the first legatee. The case of *Timberlake v. Graves*, 6 Munf. 174, is probably as strong a case as can be found to show the



very slight circumstances which have afforded the courts an opportunity of taking cases out of the rule of law. In that case the testatrix gave to her nephew a number of negroes "to him and his heirs forever; but in case it should please God for him to die without heirs, then and in that case it is my wish what I have given him to be equally divided between my two nieces M. A. and P. A." The court sustained this limitation over, and, although the language of that will differs very slightly from the one we are considering, yet the difference happens in a matter which Judge Roane relied upon as the very basis of his opinion in favor of the limitation. The ground upon which the opinion was founded is, that the devise over to the nieces is to *them merely*, and not to them and their heirs. It was intended as a personal benefit to them, and the words "then and in that case" and "equally to be divided" are merely referred to as auxiliary circumstances justifying this construction. It is unnecessary to decide whether, in this state and under our statute of wills, this limitation over to the two nieces could be regarded as a personal bequest, which could only be available to them in the event they survived the first taker. It is sufficient to say that the limitation in the will we are considering to the daughter "Mahala and her heirs" will not admit of any such construction.

It may be proper to observe here, that we regard the question in this case as one of authority merely. When the cases speak of words and circumstances to show the plain intent of the testator to be a definite and not an indefinite failure of issue, we understand them to refer to that intent as manifested *solely* by the additional words and circumstances. If the question was one of intent, arising generally from the face of the will, we could have no hesitation in saying at once that the testator Colden Williams, when he spoke of his daughter Charity dying without issue, alluded to *her* death without issue, and not to the death of her great grandchild or any remote descendant without issue. No additional words could add any force to this conclusion. But that is



not the question. The question is, conceding that the words "dying without issue" means an indefinite failure of issue, are there *other words which, of themselves and in despite of this general manifestation of intention* to keep the property indefinitely in the descendants of the first taker, point incontestably and unequivocally to the death of the first taker as the period contemplated by the testator when the limitation over should take effect. What those words must be, or, at all events, what must be their unequivocal import, is almost as well settled by the precedents as the rule itself. There is, it is true, conflict as to the precise words which will answer, and some courts have gone further than others, and seized upon slighter pretexts and more, apparently, trivial circumstances to carry out what every one now seems ready to admit to be the real intention in all such cases. It is not necessary for us to review the cases, it is sufficient to say that we have found no case which could warrant the conclusion that the particular phraseology of the will now before us would overrule the general import of the words "dying without issue." No case has been cited, and we presume none could be found. Without, therefore, going into any examination of the numerous cases on this subject, it is sufficient to say that the particular phrases which the courts have in other cases seized upon to give effect to the limitation over, are not to be found in this will, and that the principles established by those cases will not apply to the present.

Our statute concerning wills provides that "the judges of the respective courts and all others concerned in the execution of any last will and testament, shall have due regard to the direction of the will and the true intent and meaning of the testator in all matters and things that shall be brought before them concerning the same." It may be thought that this injunction would be a sufficient authority to the courts to disregard this ancient rule for the construction of wills which clearly frustrates the "true intent and meaning" of the testator. But this provision has been on our statute books since 1814, (Geyer's Dig. p. 430,) and in 1825, not-

withstanding the general declaration in the act, the legislature found it necessary to change the rules for the construction of wills in several particulars. The rule in Shelly's case was abolished; (R. C. 1825, p. —, tit. Wills, § 18;) the omission of the words "heirs and assign," or the words "heirs and assigns forever," was not allowed to thwart the purposes of the testator; (R. C. 1825, p. —, § 19;) and lapsed legacies were provided for (sec. 21). Subsequently, in 1845, the rule concerning the words "dying without issue" was established; so that the legislative construction of this general provision in the law concerning wills, requiring the courts to have regard to the true intent and meaning of the will, acquiesced in, if not positively sanctioned, by similar judicial construction, has been to regard the true intent and meaning of the testator as an intent to be ascertained in accordance with the fixed rules of construction adopted and recognized from the earliest times down to the present, however much these rules may have been regarded as calculated to mislead in an honest search after the testator's meaning. Nobody could doubt that a testator who devised Blackacre to A. without any further mention of the subject, meant to give A. an absolute estate in Blackacre, but it was very well settled law until otherwise declared by statute that A. would, under such a devise, take only an estate for life. It was not in the power of the courts to say that it was the intent of the testator to give A. a fee simple, for the rule of law for the construction of this will was different; and there could be no stability or certainty in titles if the rules for the construction of particular phrases in deeds or wills could be changed according to the mere caprices of the courts. When they are once fixed, every one can buy or sell with confidence; but if different courts can change them according to their varying notions of justice, titles become unsettled.

This case, we may add in conclusion, is one of the first impression in this state. The cases of *Wilson v. Cockrell*, 8 Mo. 1; *Vaughn v. Guy*, 17 Mo. 479; *Hulbert v. Hulbert*, 21 Mo. 277, are cases of deeds; and there is nothing de-

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cided or said in them which conflicts with our conclusion in this case.

Judge Ewing concurring, the judgment of the circuit court is affirmed.

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THE STATE, Appellant, v. WOOLERY, Respondent.

1. The pardoning power granted by the constitution to the governor of this state extends to the granting of pardons as well before as after conviction.

*Appeal from Benton Circuit Court.*

The pardon pleaded in bar by the defendant was granted pending the indictment.

Noell, (attorney general,) for the State.

Johnson & Ballou, for respondent.

I. The governor has power to grant pardons before conviction. (Const. of Mo., art. 4, § 6; State v. Sloss, 25 Mo. 291; 4 Black. Com. 395, 401; 1 Bish. Crim. Law, § 705; 1 Kent Comm. 284; 18 How. 310; 1 Hawk. P. C. 553; Story on Const. § 1509; 7 Pet. 150; Baldw. C. C. 91; 1 Opinions of Att'ys General, p. 341; 2 id. 230.) The plea in bar is good. (1 Archb. C. L. 114; 1 Chitt. C. L. 469.)

SCOTT, Judge, delivered the opinion of the court.

Prudence Woolery was indicted for murdering her bastard child. She plead in bar of the indictment a pardon from the governor, which was allowed her. From this the State appealed, maintaining that the governor could not pardon before conviction.

The constitution ordains that the governor shall have power to remit fines and forfeitures, and, except in cases of impeachment, to grant reprieves and pardons. Thus it will be seen that, with a single exception, the power of pardon is

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absolute and uncontrolled, and the governor possesses that prerogative in as ample manner as it is enjoyed by the kings of England. There it never was doubted but that the king could pardon before conviction. Blackstone says that a pardon may be pleaded in bar of an indictment. If it is a good bar to a prosecution, it must be a valid act. (4 Black. Comm. 337.) He says the king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon; (id. p. 402;) thus clearly showing that a pardon before conviction is effectual.

It seems to be equally well settled in the United States that unless the power of pardoning is restricted, it may be exercised as well before as after conviction. (Rawle on the Constitution, 177; Walker's American Law, 98.)

The other judges concurring, the judgment will be affirmed.



HARPER, Plaintiff in Error, v. HARPER, Defendant in Error.

1. Where a wife seeks a divorce from her husband she must separate herself from his bed; she can not expect to maintain her suit and share his bed at the same time.
2. Courts will not grant divorces to those who, by a long course of ill-advised and imprudent conduct, have produced such a state of alienation of feeling as would, if unexplained, seemingly warrant a divorce.

*Error to Jackson Circuit Court.*

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

*Chrisman & Comingo and Smart & Sheley*, for plaintiff in error.

I. The charge of adultery made by a husband against a wife is such an indignity as will authorize a divorce. (19

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Mo. 355 ; R. C. 1855, tit. Divorce ; 5 Blackf. 81.) Although plaintiff remained with defendant after the charges of infidelity, it does not amount to a condonation. (6 Mars. 69 ; 6 Barr, 449 ; Bishop on Mar. & Div. § 368, 371 ; 7 Paige, 60.) Before defendant could legally avail himself of any testimony amounting to recrimination, or tending to show it, he must specifically plead it. (Bishop on Mar. and Div. § 408 ; 4 Paige, 432.) The court, therefore, erred in receiving the testimony of Beamer and Twyman. Recrimination to be a bar must be such as to constitute a proper basis for a judicial decree. (10 Calf. 257 ; 12 Mo. 53 ; Bishop, § 407.)

*Hovey & Hicks*, for defendant in error.

I. Plaintiff was not the innocent and injured party. The evidence sustains the decree. (See 28 Mo. 592 ; 27 Mo. 383.)

SCOTT, Judge, delivered the opinion of the court.

This is a proceeding instituted by the plaintiff in order to obtain a decree from her husband, the defendant, from the bonds of matrimony.

From the zeal manifested by those engaged in the management of the cause, we infer it is one in which the parties feel a deep interest, and we have given it that deliberation its importance claims from us. This lady acted unwisely in placing herself under the direction and control of others in instituting this suit. She must have known that, in the event of such a proceeding, a separation from the bed and board of her husband was indispensably necessary. She could not expect to live in the house of a husband from whom she was seeking a divorce, and that, too, on the ground that he rendered her condition intolerable. If the husband's cruelty drives his wife from his house, the law sends her out with credit for all that may be necessary for a support according to her husband's state and expectations in life. Knowing this, how could she expect that the courts would not mistrust her sincerity when she complained that her husband

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rendered her condition intolerable, if, when the officer of the law went with her process against her husband he should summon him at a late hour of the night from her bed. How so revolting a transaction occurred is nowhere explained. There is no pretence that there was any force or authority of the husband exerted in order to compel the stay of the plaintiff at his house.

We are not of the opinion that the plaintiff has made out a case for a divorce. She seems to have had an agency in bringing about the state of which she complains. That lively sensitiveness on the subject of her reputation for virtue hardly corresponds with the obstinacy of her conduct towards the object of her husband's jealousy. So keen a sensibility should have restrained her from showing any attentions to the individual of whom she knew her husband was suspicious. Her conduct, however innocent at first, was certainly unbecoming, after she was apprised of her husband's apprehensions, although they may have been ill-founded. He had a right to admonish her, and although there may have been no cause for his admonitions, yet she must have known that if she persisted in her course the suspicions against her would be heightened. Had there been such a state of mind between her and the object of her husband's fears as should only have existed, it does seem that after they were informed of the defendant's state, nothing should afterwards have been done that would serve to continue or strengthen his suspicions. A woman, sensibly alive to her reputation for virtue, would never persist in a course of conduct which she was aware excited suspicions against her in the minds of those to whom that virtue is dear. A married couple must yield a little to each other's inclinations, although they may appear somewhat unreasonable; and though there may be no criminality in refusing to do this, yet when, by obstinacy and non-compliance, an alienated state of mind is produced between them, they can not expect that the courts will lend too indulgent an ear to their applications for a divorce. Courts will not grant divorces to



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those who, by a long course of ill-advised conduct, have produced a state of things which would seemingly warrant such a measure. These observations have been made, not with the view of making any insinuations against the virtue of the plaintiff, but as showing that, in our opinion, such indignities had not been offered to her by her husband as rendered her condition intolerable.

The evidence offered by the defendant and admitted against the objections of the plaintiff does not, in our opinion, affect the determination of the case. The suit of the plaintiff must have failed, although the evidence had been excluded.

Affirmed; the other judges concur.

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BLEW, Respondent, v. MCCLELLAND, Appellant.

1. Where there is a parol agreement for the purchase of real estate, and the purchaser pays a portion of the purchase money, but there is not such part performance as will take the case out of the statute of frauds, and a loss occurs, as by the burning of buildings, before the execution of a valid contract of sale, such loss will fall upon the vendor, and the purchaser may recover back the purchase money advanced.

*Appeal from Mercer Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Slack, Edwards & H. C. Ewing*, for appellant.

I. McClelland admitted the agreement as charged. It was therefore not void. Blew had no right to insist upon the statute of frauds. He has stated what the contract was. (*McGowen v. West*, 7 Mo. 569; *Farrar v. Patten*, 20 Mo. 83.) McClelland has admitted the important facts as stated. McClelland's having received the insurance money does not affect his rights. (2 *Amer. L. Cas.* 535, 403; 4 *Mass.* 331.) The loss by fire falls upon the vendee. (*Sugd. on Vend.*

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277.) The court erred in striking out the answers of McClelland. (Paine v. Meller, 6 Ves. 349.)

*Harris and Tindall & Shanklin*, for respondent.

I. The portions of defendant's answers were properly stricken out. The contract of purchase was incomplete. At the time of the fire plaintiff was not, either in law or equity, the owner. (See *Thompson v. Gould*, 20 Pick. 134; 11 B. Monr. 42; 2 Story Eq. § 769; 14 Pet. 173; 5 Pet. 264; 1 Pet. 376; 2 Sch. & Lif. 554; 4 Pet. 311; 6 Sim. 340; *Greenway v. Adams*, 12 Ves. 399; *Denton v. Stewart*, 1 Cox, 258; 2 Keen, 25.)

NAPTON, Judge, delivered the opinion of the court.

On the 8th of November, 1856, Blue, the plaintiff, made a verbal contract with McClelland for the purchase of a lot in the town of Princeton, Mercer county, on which there was a tavern and other buildings. The improvements constituted the principal value of the property. The price agreed on was \$1,550, five hundred of which was paid down. McClelland was to execute on the same day, or the Monday following, a title bond for a conveyance of the title when the purchase money was paid, and Blue was to give his notes for the balance of the purchase money. On Sunday, the 9th of November, the buildings were all destroyed by fire. Nothing further was done; the title bond, although tendered, was never received, and the notes for \$1,050 were not executed. McClelland had a policy of insurance on the premises for eight hundred dollars, which he collected from the company, representing himself as the owner, and which in his answer he offers to treat as a liquidation of the purchase money, *pro tanto*. This suit is brought by Blue to recover the five hundred dollars purchase money advanced, and the only question presented by the record is whether, under these circumstances, the action will lie.

The case of *Paine v. Meller*, 6 Ves. 349, is understood to have determined that, where there is a contract for the sale

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of a house, and before a conveyance the house is burned down, the loss falls on the purchaser, and the purchaser is still bound to execute his agreement to pay the purchase money. This does not appear to have been the opinion of the Master of the Rolls in *Stout v. Bailey*, 2 P. Wms. 220, who thought, in such a case, the purchaser would not be bound. But Sir Edward Sugden seems to regard the decision of Lord Eldon, in *Paine v. Meller*, as the true exposition of the law. It is based upon the doctrine that equity regards as done what has been agreed to be done, and therefore, after a valid agreement to purchase, looks upon the purchaser as the owner. Hence Sir Edward Sugden declares the law to be that a "vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to the benefit which may accrue to the estate in the interim." (1 Sugden on Vendors, 277.) The principle has, in England, been carried to the extent of holding that, where an agreement was made for the purchase of an estate in consideration of an annuity for life to the vendor, and he dies before the conveyance and before the annuity becomes due, the contract will still be specifically enforced. (*Mortimer v. Cupper*, 1 Bro. C. C. 156; *Jackson v. Lever* and others, 3 Bro. C. C. 605.)

But the maxim of courts of equity, that whatever is agreed to be done is considered as actually performed, is confined to cases where the contract or agreement is a valid one and can be enforced. If the contract, by reason of its being by parol, is one which neither a court of equity or of law can enforce, and nothing has been done to withdraw it from the operation of the statute of frauds, the title remains as it was, both in law and equity, unaffected by the parol agreement; and whatever accidental losses the property may sustain must of course fall upon the owner. In such a case, it is clear that if, after the parol agreement to purchase, a valuable gold mine was found upon the premises, the pur-

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chaser could not compel a specific performance, unless there had been a change of possession or some other circumstance which courts have determined sufficient to take a case out of the statute. Neither ought he to be compelled to pay his purchase money, when a fire has destroyed the buildings which formed the principal inducement for the purchase. It would be very inequitable to adopt a rule which would not operate alike on vendor and vendee, which would leave it to the option of one to enforce the contract or not, as it might promote his interest or caprice. The case of McGowan v. West, 7 Mo. 569, was a case where the purchaser had taken possession, and by reason of that circumstance could have enforced a conveyance notwithstanding the contract was by parol. This court would not permit him to hold on to the land, and set up, as a defence to a suit upon his note for the purchase money, that the contract was a parol one. In the present case, there was no change of possession, and there was no other circumstance which would have enabled the plaintiff to enforce a specific performance of the contract had the estate, instead of being almost rendered valueless, been unexpectedly increased in value. As the contract could not be enforced by the purchaser, it would be unjust to enforce it against him. Cunnutt v. Roberts, 11 B. Monr. 42.)

Judge Scott concurring, the judgment of the circuit court is affirmed. Judge Ewing, having been of counsel, did not sit in this case.

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SMITH'S ADMINISTRATORS, Defendants in Error, v. THOMAS,  
Plaintiff in Error.

1. A written contract is presumed to contain the whole contract entered into between the parties thereto.
2. In a suit upon a promissory note absolute on its face, parol evidence is inadmissible to show that, though absolute in form, it was payable only upon a contingency, or that in a certain event only one-half the amount was to be paid.

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Smith's Adm'r's v. Thomas.

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*Error to Jackson Circuit Court.*

This was a suit upon the following due bill or promissory note: "February 8, 1855. Due Jabez Smith three hundred dollars, borrowed money. [Signed] Charles N. Thomas." The defendant set up in his answer that the consideration of said note was the sum of three hundred dollars, borrowed of said Smith for the use of one Todd; that at the date of said note both Smith and Thomas had liens upon some slaves belonging to Todd to secure debts due them respectively; that there was also at that time a judgment and execution lien upon said slaves that was prior to the liens of Smith and Thomas; that Todd wanted Smith to loan him more money to pay off this prior lien; that Smith was unwilling to do so; that Smith, in order to induce Thomas to loan the money to Todd, promised Todd that if he would borrow the money from him for Todd, and give his note to him (Smith), he would lose half the debt if Todd did not pay to said Thomas the money loaned, and Thomas should be held to pay only one-half the note; that in consideration of this promise Thomas did borrow the money and gave the note sued on and paid the money over to Todd, who applied it to the payment and release of the prior lien; that Todd has never paid said sum of money nor any part thereof to defendant Thomas, and is hopelessly insolvent.

At the trial the evidence adduced supported the answer. Smith's lien upon Todd's slaves was prior to that of Thomas.

The cause was tried by the court without a jury. The court refused the following declaration of law asked by defendant: "If the court, sitting as a jury, believe from the evidence that Smith, for the purpose of inducing Thomas to borrow from him three hundred dollars to pay to said Todd, to enable said Todd to pay off the prior lien mentioned in the answer, did promise Thomas that, if he would so borrow said sum, to be applied by Todd to the liquidation of said lien, and give said Thomas' note therefor, that said Thomas should only pay the one-half of said note if he should fail

to collect the same amount off of Todd thereafter; and that by said promise of Smith he did induce said Thomas so to borrow said sum and to give Smith the note here sued on, and that said sum so borrowed was applied to the liquidation of said prior lien; and that said Thomas has been unable to collect said sum or any part of it from Todd; and that Todd is now hopelessly insolvent, that then it will find for plaintiff only one-half the amount of said note and interest."

The court found for plaintiff.

*Hovey*, for plaintiff in error.

I. The promise of Smith was not within the statute of frauds. (23 Mo. 431; 26 Mo. 221.) The court ought to have granted the instruction asked. (See 8 Mo. 677; 2 Kent Comm. 465; 5 Pick. 384; 21 Mo. 573; Addison on Contr. 843; 3 Hill, 171; 20 Mo. 433, 297; 12 Mo. 298.) The evidence does not vary the written instrument; the due bill merely asserts a fact, and not a promise or contract.

*Hicks & Shelby*, for defendants in error.

I. There was no consideration for the promise made by Smith. It could not be set up to vary and contradict the written contract. (8 Mo. 161, 391; 24 Mo. 519; 17 Mo. 577.)

EWING, Judge, delivered the opinion of the court.

This was an action on a due bill executed by the plaintiff in error to Jabez Smith, deceased, for three hundred dollars, borrowed money. The answer sets up a verbal agreement between the defendant and Smith at the time the due bill was given, by which it is alleged that but half of the sum called for by it was to be paid by the defendant in a certain event.

The only point in this case that need be noticed is whether the verbal agreement relied on by the defendant was admissible as a defence to the action, and we are of opinion it was not. The instrument is in form a due bill, but in legal



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effect a promissory note, because it is an acknowledgment of indebtedness, which it is well settled implies a promise of payment. It being then a promissory note absolute on its face and complete in itself, was parol evidence admissible to make it conditional or payable upon a contingency? The defence is not that there is a want or failure of consideration, or that a fraud was practiced upon the defendant in respect to the transaction by Smith; but the question is whether effect shall be given to a contemporaneous oral agreement, by which the liability of the defendant is to pay one hundred and fifty instead of three hundred dollars; whether, in other words, he may by proof of a verbal understanding show that a contingency or condition not incorporated into the writing has happened, and in consequence thereof the debt is only half of what it purports to be by the due bill. I am unable to see any thing in the transaction that takes the case out of the operation of the general rule against admitting parol evidence to add to, vary or contradict a written instrument. This contract is sought to be controlled by an oral agreement, made concurrently with it, engrafting upon it a stipulation by which the absolute promise shall be a conditional one; and, instead of an agreement to pay the amount called for by the writing, the defendant proposes to show that, upon the failure of Todd to pay him that sum, he in that event only owes the plaintiff half the face of the note. If the rule adverted to does not apply in this and like cases, it is not easy to imagine a case to which it would apply. Whatever difficulty there may be sometimes in the application of the general principle to given cases, it does not exist in the class of cases to which the one under consideration belongs. For the cases are numerous of the application of the rule in actions on notes absolute on their face, where it has been attempted to control their effect by proof of a contemporaneous oral agreement, showing that payment was to be made on a condition. (*Ransom v. Walker*, 1 Stark. 361; *Mosely v. Hariford*, 10 B. & C. 729; *Foster v. Jolly*, 1 C. M. & R. 703; *Adams v. Wordly*, 1 M. & W. 378; *Hunt*

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v. Adams, 7 Mass. 518; Cotes v. Wakefield, 15 Pick. 437; 9 Metc. 41.) Hence a note payable on "demand" or a specified day can not be varied in its operation by parol evidence of a verbal agreement that the principal should not be called for as long as the interest was punctually paid; (5 Pick. 506;) or that it should be paid at another time or in any other mode than is imported on its face. (1 Chitty, 661; 3 Fair. 466; 4 Mass. 414.) A sum in which a note is made payable can not, consistently with the rule, be varied by parol except upon the principle of showing want, failure or fraud in the consideration. The same rule forbids evidence of a contemporaneous or anterior parol stipulation between the parties varying the legal effect of a note where no time of payment is specified. (8 John. 189; see also Jones v. Jeffries, 17 Mo. 578.) The general rule on this subject is too familiar to require a reference to authorities, and the cases cited are referred to as instances of the application of the rule to promissory notes alone, and to cases analogous to that under consideration.

The judgment is affirmed; the other judges concurring.



CHEATHAM *et al.*, Respondents, v. HILL, Appellant.

1. Smith's Administrators, ante, p. 307, affirmed.

*Appeal from Lafayette Circuit Court.*

EWING, Judge, delivered the opinion of the court.

The answer in this case contains no allegation of fraud; the defence it set up was inadmissible for the reasons given in the opinion in the case of Chrisman & Smart, administrators of Smith, v. Thomas, decided at this term.

Judgment affirmed; the other judges concurring.

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Smithers v. Steamboat War Eagle.

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SMITHERS, Defendant in Error, v. STEAMBOAT WAR EAGLE,  
Plaintiff in Error.

1. In an action against a steamboat in which it is sought to hold the steamboat responsible as a common carrier, it is not necessary that the petition should expressly state that the steamboat is a common carrier; it is sufficient if it clearly appear from the whole petition that the contract of affreightment, the breach of which is complained of, was entered into with her in that capacity.

*Error to Lafayette Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Ryland & Son*, for plaintiff in error.

I. The court should have granted the instruction asked. The action being founded on tort and not on contract the defendant was bound to use only ordinary care and prudence. (*Ready v. Steamboat Highland Mary*, 17 Mo. 461.) The action against a boat as such must be founded on contract. (*R. C.* 1855, p. 304.) The rigid rules applied against common carriers do not apply to actions against boats.

EWING, Judge, delivered the opinion of the court.

The question in this case is whether the allegations in the petition show the liability of the defendant as a common carrier. If so, the court below committed no error in refusing the instructions asked by the plaintiff in error and in overruling his motion for a new trial.

The petition alleges that as the owner of a certain horse he (the plaintiff) shipped him on board of said steamboat War Eagle, with divers other horses, goods and chattels, at the port of St. Louis, in the State of Missouri, to be safely carried, conveyed and delivered to plaintiff at the wharf at the city of Lexington, on the Missouri river, for certain freight and reward in that behalf paid defendant by said plaintiff; and the defendant then and there took and received

the same accordingly to be delivered safely at the wharf at the city of Lexington aforesaid; and the plaintiff states that on the said 10th day of September, 1859, and for a long time before and afterwards, the defendant was and still is a steamboat navigating the waters of this state, to-wit, the waters of the Missouri river. The petition then avers that the said defendant, while so used and being engaged in navigating the waters of the Missouri river, on, &c., and not regarding her duty in that behalf, and while she was discharging freight at the city of Lexington aforesaid, the place at which said horse was to be delivered, wrongfully and unlawfully and through the carelessness and negligence, misdirection and unskillfulness of the officers and crew in taking said horse from the boat, said horse was killed, by reason of which premises defendant did not safely carry, convey and deliver said horse according to the terms of her contract as aforesaid. The answer denies carelessness or negligence, and alleges that the horse lost his life accidentally.

It was proved on the trial that on leading the horse from the boat he fell off the staging and was killed. It is unnecessary, however, to notice the evidence in detail, as in our view of the case the instructions did not present the issues made by the pleadings. The instructions in substance are that the action was not against the defendant as a common carrier, but was founded upon negligence and alleged wrongful acts; and that the defendant was bound for ordinary care and prudence only. The instructions were erroneous if the petition shows the defendant to be a common carrier, and we think it does. It is somewhat informally framed, and the averments respecting the negligence and carelessness of the defendant might have been omitted; but these allegations are but surplusage, and do not vitiate the petition. The petition does not state *totidem verbis* that the defendant is a common carrier, but it must be held good, if the fact appears from the averments, notwithstanding that omission.

The most common and the most important description of carriers by water at the present day in this country are the

owners and masters of steamboats, which boats are in almost all cases engaged in the transportation of goods as well as of persons for hire, and are hence answerable for all goods generally shipped on board unless for losses happening by act of God or the public enemy. (Angell on Carriers, § 83.) An allegation, in a declaration against joint owners of a steamboat, that the defendant, before and at the time of shipment, were the owners and proprietors of the boat and copartners in freighting, and which boat was usually employed in conveying and transporting cotton, &c., for hire, is a sufficient averment of the character of the owner as common carriers. (3 Stew. & Port. 135; 2 Selwyn, —.) In Bennett v. Fel-yan, 1 Flor. 403, it was held that where a declaration alleges that the defendant followed the occupation of a master or owner of a steamboat plying on a navigable river, it was a sufficient averment to fix the character which the common law attaches to masters and owners of ships, steamboats, &c., so as to charge the defendant with a breach of duty which alone results from that character, without an express averment that the defendant was a common carrier. The court in that case say that the declaration being sufficient, *prima facie*, to make the defendant liable if the plaintiff's allegations are supported by the evidence, the *onus probandi* was upon the defendant to show that, in virtue of some special public notice, or other good legal ground, he was not chargeable and responsible as a common carrier in his capacity and occupation of master or owner of the steamboat in question.

The petition in the case before us does not, it is true, anywhere use the words common carrier, but we think this sufficiently appears from the allegations it contains and the general frame of the petition. It avers that the defendant at and for a long time before the shipment was and still is a steamboat navigating the waters of this state, to-wit, the waters of the Missouri river; that the goods were delivered to and received by the defendant at the port of St. Louis to be safely conveyed to the city of Lexington, on the Missouri

river, for certain hire and reward, and while so engaged in navigating said waters and not regarding her duty in that behalf, on, &c., at, &c. These averments we deem sufficient to fix the character of the defendant as a common carrier; and as her liability to the plaintiff did not therefore depend upon the question of negligence, the instructions asked by the plaintiff in error on that subject were erroneous and were rightly refused.

The judgment will be affirmed; the other judges concurring.

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SHIELDS, Plaintiff in Error, v. POWERS *et al.*, Defendants in Error.

1. The title acquired by virtue of a sale under an erroneous judgment or decree is good and valid although the judgment or decree should afterwards be reversed, provided there is no stay of execution and no supersedeas at the time such sale is made.
2. A minor against whom a decree may have been rendered is not entitled, it seems, to a day in court on attaining his majority to appear and show cause against the decree.

*Error to Benton Circuit Court.*

The facts of this case, so far as it is necessary to set them forth, are briefly as follows: In 1841 one Jonas Heath sold the land in controversy to one Peter Ashley. Ashley did not pay the whole of the purchase money. Both Heath and Ashley died. Heath's administrator brought suit against Ashley's administrator to recover the balance of the purchase money. He recovered judgment. He then filed a bill in chancery against Ashley's administrator and his minor heirs to subject the land to the payment of the purchase money. A guardian *ad litem* was appointed for the minor defendants, but no answer was filed for them. A decree *pro confesso* was rendered without the taking of any proof. Under this decree in 1849, a sale was had of the land and one White,



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under whom plaintiff claims, became the purchaser and received the sheriff's deed therefor. This decree was afterwards reversed on a writ of error to the supreme court. On suing out the writ of error, no supersedeas had been granted. (See Heath's adm'r v. Ashley's adm'r et al., 15 Mo. 393.) Defendants claim title by virtue of a subsequent sale by Ashley's administrator for the payment of the debts.

The court gave the following instruction at the instance of the defendants: "1. The court instructs that it devolved on the plaintiff, in order to recover in this case, to prove to the satisfaction of the jury that he was entitled to the possession of the land at the time of the commencement of this suit; that in order to make out a title under the sale to Horace H. White by virtue of a decree in chancery it was necessary to show a valid decree; that the decree read in evidence is invalid, and the purchase under it by Horace H. White conferred on him no sufficient title to enable plaintiff to maintain this action against these defendants or either of them; and though the jury may believe all the evidence introduced by plaintiff in this cause, they will find a verdict for defendants."

Instructions asked by plaintiff were refused. Plaintiff took a nonsuit, with leave, &c.

*Johnson & Ballou*, for plaintiff in error.

I. It was contended, among many other points, that the instruction given was erroneous; that at the time White acquired title under the decree it was not void, but a valid decree in full force and unreversed; that its reversal afterwards in nowise affected the title acquired at the sheriff's sale. (8 Mo. 257; 9 Mo. 121; Sugd. on V. 61; Sch. & Lef. 565; 2 Bro. 248; 16 Mo. 173; 4 Mo. 253; 19 Mo. 425; 7 Mo. 426; 10 Pet. 473; 2 Pet. 163; 8 Johns. 361; 17 Mo. 71.)

*Freeman, Ryland & Son*, for defendants in error.

I. The decree under which White purchased was invalid and of no effect. It was taken *pro confesso* against minors

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without plea, answer or proof. (8 Ohio, 377; 8 Blackf. 300; 6 Sm. & Marsh. 61; 15 Mo. 393; 18 B. Monr. 666, 779; 16 B. Monr. 289.) No day in court was given to the infants. (8 Ohio, 377; 1 Harr. Ch. P. 425; 11 Mo. 421.) Being invalid as to the infant heirs, it was invalid as to all, for a judgment is an entirety. (5 Leigh, 460; 11 N. H. 299; 12 Johns. 434; 5 Wend. 161.) The instruction given was proper. The judgment against the infants was not merely erroneous; it was irregular and void. (See 15 Johns. 121; 1 Gow. 735; 3 Wils. 341; Cro. Jac. 464; 1 Hale P. C. 24; 13 Mo. 458; 7 Mo. 426.)

SCOTT, Judge, delivered the opinion of the court.

This record presents a case of great hardship on the infants whose lands have been sacrificed under an erroneous decree; but when we see that they are not to be benefitted by the result of this suit, whatever it may be, our regret at the want of conformity to law in the proceedings by which they were deprived of their inheritance is much diminished, as their rights, whatever they were, have all, by process of law, been conveyed to opposing claimants, those claiming against the erroneous or invalid proceedings being purchasers for an inconsiderable sum at an administrator's sale made for the payment of the debts of the ancestor of the infants.

The erroneous judgment, under which the infants' lands were sold, was brought up to this court and reversed on a writ of error, but no supersedeas having been applied for or obtained pending the writ of error, the land was sold to one under whom the plaintiff claims. Now we know of no principle by which we can distinguish this case from all others in which an erroneous judgment is reversed on error. In such cases a sale under execution before the reversal passes title to the thing sold, and those who have been deprived of their property by the sale must look to a restitution of the fruits of it only. All the cases referred to by the defendants, in which it was held that decrees taken against infants for want of an answer, *pro confesso*, were erroneous and void, were

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original suits in which the regularity of the proceedings in obtaining or proceeding to judgment were reviewed. They were cases on appeal or standing for judgment, and not collateral suits, as this is, brought to declare as nullities the proceedings in an original suit. We do not see a distinction taken between the reversal of judgments against infants and those against adults. The case of *Wyatt v. Mansfield's heirs*, 18 Ben. Monr. 779, is an anomalous one and founded on statutes with which we have no familiarity.

In this case, it seems, the minors were served, and guardians *ad litem* appointed, who never consented to act, and the bill was taken as confessed against the minors; and without any proof a decree was rendered against them. Before, however, any final decree was rendered, a guardian *ad litem* appeared and objected to a decree without proof, but his objection was overruled.

If the not giving a minor a day after his attaining his majority was error, we do not distinguish it from any other error for which a decree might be reversed. Perhaps in such cases, as a minor was entitled to it, he would be allowed the benefit of it whether it was granted him or not. But the answer to this objection is that, as our law now seems to stand, the minor has no such right in any case. The case of *Ruby v. Strother*, 11 Mo. 417, was overruled by the case of *Creath v. Smith*, 20 Mo. 113, concurred in by a majority of the court.

Reversed and remanded; the other judges concur.

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NORTH MISSOURI RAILROAD COMPANY, Plaintiff in Error, v.  
WINKLER, Defendant in Error.

1. Where a person subscribes to the stock of a railroad company upon condition that the road should "pass" through a certain county, and on a certain designated route, it is not a condition precedent to the right of the company to demand the amount subscribed that it should actually construct and complete the road along the line designated; it is sufficient if the road be thus permanently located.

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*Error to Macon Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Carr & Wells*, for plaintiff in error.

I. When the company had run the line of the road on the route indicated and permanently located it, it "passed" through the county on the route indicated within the meaning of the agreement. (Central Plank Road v. Clemens, 16 Mo. 359; Pacific Railroad v. Renshaw, 18 Mo. 210; Hannibal Plank Road Co. v. Menafee, 25 Mo. 547; Redfield on Railways, 74; McMillan v. Lexington and Marysville R. R. Co. 15 B. Monr. 218; State v. Collins, 6 Ohio, 61; 18 Mo. 562; 9 Watts, 458; 27 Penn. State, 261; Henderson and Nashville R. R. Co. v. Lavelle, 16 B. Monr. 358; 7 Ind. 407.)

*Gilstrap & Taylor*, for defendant in error.

I. The passing through of a permanent location is not the passing through of the road. Of what interest could it be to secure the location of the road at a particular place without reference to whether it would be built or not? The defendant intended to secure to himself the benefit of a railroad built and in operation.

EWING, Judge, delivered the opinion of the court.

This was an action by the North Missouri Railroad Company against the defendant to recover one share of stock which he had subscribed thereto. The petition alleges that "on the 23d of December, 1853, the defendant subscribed to the capital stock of said railroad company one share, amounting to one hundred dollars, by which he agreed to pay all calls upon said stock as the same should be made by order of the board of directors of said company, provided the road of said company passed through Macon county, on the dividing ridge which separated the waters of the Mississippi from the waters of the Missouri river, and on or near the route as it had been surveyed in range fourteen, in said county, pre-

vious to the defendant subscribing to the capital stock of said railroad company as aforesaid." The petition then avers that previous to the 22d December, 1855, the said company permanently located the route of the road through Macon county, on the dividing ridge which separates the waters of the Mississippi river from the waters of the Missouri river, and on or near the route, as it had been surveyed in range fourteen, in said county, previous to defendant's subscribing to the capital stock of said railroad company as aforesaid; and that by thus *permanently locating* said road as above stated, the condition on which the stock was subscribed was performed. It is then averred that the money remains unpaid. The petition was demurred to, and the demurrer having been sustained the cause is brought to this court by writ of error.

The question for our consideration involves the construction of the subscription paper, the terms of which are set out in the petition as above given, and whether the actual construction of the road was a condition precedent to the payment of the subscription.

We think the contract, by a fair and reasonable interpretation, means that when the road is permanently *located* the stock becomes payable, and that when this is done the company has done all that is necessary to give them a right to demand it. This view better accords with the sense which common usage has annexed to the terms of the instrument, with the object of the subscription, and the nature of the enterprise. The condition is that "the road passes through Macon county, on the dividing ridge" designated in the subscription paper; and these terms are to be understood and interpreted according to the subject matter to which they relate. They are here used evidently to designate the place where the road shall run or where the route or line of the road is to pass, and are equivalent to the expression "provided the road runs or is located through Macon county." An example of the sense in which the words of the subscription are employed, is found in the charter of the company, where it speaks

of the road as passing through the lands of a certain class of persons. That the *location* of the road merely was what the parties had in view when fixing the condition of the subscription is still more palpable from a little further attention to the terms or phraseology employed to designate it, describing it with a degree of minuteness by reference to natural features of the country, which clearly show the *route* of the road to have been in the minds of the parties at the time.

But taking into consideration the objects of the subscription, the magnitude of the undertaking, and the circumstances that the parties must have had in view at the time, and interpreting the instrument with reference to these, we think no doubt can be entertained as to its real intent and meaning, or as to the sense in which it must have been understood by the parties. The stock subscribed was for the purpose of building the road, and was the means by which it was to be accomplished. For this purpose it must be payable as the work progresses, and it would be unreasonable to suppose that the company intended to deprive itself of the power to make the subscriptions available for the very object for which they were made, and whenever its necessities required. On the other hand, it would seem equally unreasonable that, if the subscribers intended to make the construction of the road a condition precedent to the payment of stock, they should have omitted the most obvious and appropriate words to express such intent; for there is nothing whatever said in the instrument about *constructing, building or completing* the road; nor is there any equivalent expression.

The case of *McMillan v. Mays. & Lex. Railroad Co.*, 15 B. Monr. 234, is analagous to this, where the question involved was the construction of a paper similar to that under consideration. The suit was to recover ten shares of stock subscribed by the defendant with a promise "to pay fifty dollars on each share so subscribed in such instalments and at such times and places as may be required by the board of directors of said company, upon condition that said road shall be so located and constructed as to make the town of Carlisle a



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point in said road ; otherwise the subscription shall be null and void." The defence there was, as it is here, that the location and construction of the road were conditions precedent, and that both were to be performed before payment of the subscription could be required. But the court did not so decide. The construction of the road and payment of the stock were held to be concurrent acts, and that the entire construction of the road was not understood or intended by the parties to be a precedent condition to the payment of the stock. The proper interpretation of the undertaking, say the court, is, that the place and not the extent of the construction of the road, was evidently referred to in this stipulation. The stock was to be paid if the road was so constructed as to make the town of Carlisle a point, not when the construction of the road should be completed. If, in that case, the payment of stock and the construction of the road were concurrent acts, *a fortiori* they would seem to be in the case at bar, for in that the instrument mentioned expressly the construction of the road ; in this, no such terms were used.

The judgment will be reversed and remanded ; the other judges concurring.

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BROWN, Defendant in Error, v. RICE, Plaintiff in Error.

1. To constitute an agreement there must be the assent of the promisee ; a mere promise on one side only is not sufficient ; there must be mutuality of obligation.

*Error to Cole Circuit Court.*

This was an action originally commenced before a justice of the peace upon the following account ; "Samuel O. Rice, to Richard J. Brown, Dr. To amount which the said Rice, in January, 1859, promised to pay upon the said Brown's leaving the Barton farm, \$23." At the trial in the circuit

court the defendant asked the court to instruct as follows: "3. Although Rice may have offered Brown a twenty-three dollar note to leave the Barton farm by a certain day, if Brown failed at the time to accept the offer, Brown is not entitled to recover from Rice on this offer unless Rice gave him a certain time to accept the offer, and Brown within the time notified Rice of such acceptance." The court refused so to instruct.

*Lay & Batte*, for plaintiff in error.

I. The court erred in instructing as requested by plaintiff, also in refusing the instructions asked by defendant. Mutual consent is necessary to the creation of a contract.

*White*, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The third instruction asked by the defendant in this case, or something equivalent thereto, should, we think, have been given to the jury. There was certainly evidence from which a jury might have come to the conclusion that Rice's offer to give him his note for twenty-three dollars, if Brown would leave the Barton farm on a day named, was a mere promise, not a contract. To convert a promise into a contract, there must be the assent of the promisee, and until that is given the promiser may retract. The evidence was that Brown did not accede to the defendant's proposition, but asked for time to consider it. Whether time was given, and within the period designated the plaintiff closed the contract, was a matter for the jury. If Brown was not bound, neither was Rice. But this view of the case was not left to the jury.

Judgment reversed and case remanded; the other judges concur.

FLOWERS, Defendant in Error, v. HELM *et al.*, Plaintiffs in Error.

1. A party can not complain of an instruction given at his own instance.
2. Declarations with respect to partnership transactions by one partner are not evidence against the other partners unless made during the existence of the partnership.

*Error to Carrol Circuit Court.*

It is deemed unnecessary to set forth the facts more fully than they are stated in the opinion of the court.

*Harris*, for plaintiffs in error.

I. The court should have sustained the motion asking the court to instruct the jury to retire and make up their verdict respecting the liability of two of the defendants, James and Simon Helm. (26 Mo. 586; Sess. Acts, 1857, p. 181.) The declarations made by Jacob Helm were not evidence as against the others. They were made after the dissolution of the partnership. (23 Mo. 185; 27 Mo. 553.) The instructions given were erroneous. The court erred in refusing the instructions.

*Troxell & Ray*, for defendant in error.

I. The court properly overruled the motion made by the defendants. The court committed no error in giving or refusing instructions.

SCOTT, Judge, delivered the opinion of the court.

As there is a difference between the record as it appears before us and the statement of the case as made by counsel, we must of course be governed by the record as it is written. The instruction of which most complaint is made by the defendants it appears was given on motion of the defendants themselves. It is numbered five, and is to the effect that the declarations of Jacob Helm are to be regarded by the jury as evidence against himself only, unless the jury

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find that he and the other defendants were partners; and if they were partners, then such declarations were to be regarded as evidence against the other partners so far as they related to the partnership transactions. This instruction is too loose, as it fails to require that the declarations should have been made during the existence of the partnership. But how can its effect be obviated, when it appears to have been given at the instance of those who are now complaining of it?

There were two theories of this case; one, that each of the parties sold or authorized the sale of his share separately; the other, that there was a joint sale for the benefit of all. Taking into consideration the pleadings and the evidence in the cause, we can not say that the court below exercised its discretion improperly in refusing to permit the jury to pass on the case of two of the defendants in order that they might be made witnesses.

With the concurrence of the other judges, the judgment will be affirmed.

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PROFFITT *et al.*, Appellants, v. HENDERSON, Respondent.

1. Waste is a lasting damage to the reversion caused by the destruction, by the tenant for life or years, of such things on the land as are not included in its temporary profits.
2. The cutting of timber may be waste although necessary to the profitable enjoyment of the land; it may be waste although the land is valuable for timber only.

*Appeal from Randolph Circuit Court.*

This was an action by two of the children of David Proffitt, deceased, against John H. Henderson. Plaintiffs allege in their petition that David Proffitt at his death was seized of a certain tract of two hundred acres; that by his last will he devised said land to his widow Mary Proffitt for life, and at her death to his children John, Lucy, Elizabeth and Susan;

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that said Mary Proffitt, the widow, conveyed her interest in said land to defendant Henderson for fifty dollars; that Lucy Proffitt conveyed her interest also to defendant; and that this portion, one-fourth, has been allotted in partition to defendant; that on the remaining one hundred and fifty acres defendant, on, &c., and since, &c., committed waste and injury to said land, by cutting and carrying away timber, to the amount of six hundred dollars; that the value of said land was diminished by having said timber cut and carried away as aforesaid to the amount of six hundred dollars; that all the valuable rail timber on said land, and a large quantity of fire-wood, were wrongfully and unlawfully cut and carried away from said land by the defendant; that by said waste and injury plaintiffs were damaged to the amount of four hundred dollars, which is two-thirds of the damages sustained to those who own the remaining interest in said land by the waste and injury aforesaid; that the value of the rail timber and fire-wood cut and carried away unlawfully and wrongfully by defendant is three hundred dollars; that plaintiffs are injured by losing the value of the timber thus cut and carried away to the amount of two hundred dollars, which is two-thirds of the damage sustained as aforesaid; that they are damaged by the diminution in value of said land by the acts and doings above stated to the amount of four hundred dollars, and by losing the value of the timber as aforesaid to the amount of two hundred dollars; that plaintiffs are each entitled to one-third of the tract of one hundred and fifty acres at the death of Mary Proffitt. Plaintiffs prayed judgment for six hundred dollars, and that defendant be enjoined from cutting timber.

The court sustained a demurrer to this petition. This constitutes the error complained of.

*Reed & Denny*, for appellants.

I. The court erred in sustaining the demurrer. (See *Sedgw. on Dam.* § 139, 146; 4 *Ohio, State*, 101; 4 *Burr*, 2141.)

*Burckhardt*, for respondent.

I. The petition does not state that the cutting of the timber was not necessary for the profitable enjoyment of the land. The fact that the land was injured was not sufficient. The tenant for life has a right to enjoy the land although it may be thereby injured. There is no allegation that the cutting of the timber was not made to clear the land for cultivation. The law of waste, as recognized in England, does not apply. The land was devised to Mary Proffitt for life for her support. She had a right to use it to the best advantage for that purpose. (3 Yeats, 261; 2 Hayw. 110; Hill on Real Prop. 263.) The petition does not show that the land was valuable for any purpose except its timber. (1 Harr. 438; 2 N. J. 521; 4 Watts, 463.)

EWING, Judge, delivered the opinion of the court.

Waste is defined to be the destruction of such things on the land by a tenant for life or years as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. (1 Hill. on Real Prop. 261.) The American doctrine on the subject of waste, observes Chancellor Kent, is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country. In England the destruction of timber carries with it the idea of a permanent injury to the estate, as timber is scarce, and forest trees are planted for useful as well as ornamental purposes, and are too valuable to permit the timber to be unnecessarily destroyed. It is not waste in this country to convert arable land into meadow, nor vice versa; nor is it waste to clear land by a tenant for life. But there is a due and reasonable medium to be observed according to the custom of farmers. To cut down all the timber on a tract of land and sell it would be waste because it would be detrimental to the inheritance. (*McCullough v. Irvine's Ex'rs*, 1 Har-



ris, 446.) But cutting timber and clearing land may, so far from being waste, often enhance the value of the inheritance; and it is only when there is lasting damage to the reversionary interest, or its value has been lessened, that the tenant, in such case, is liable for waste.

In *Davis v. Gillman*, 5 Ired. Eq. 311, the doctrine is stated by Chief Justice Ruffin thus: that, as the state of the country now is, a tenant for life of land entirely wild might clear as much of it for cultivation as a prudent owner of the fee would; and might sell the timber that grew on that part of the land. Clearing for cultivation, he says, has, according to the decisions, peculiar claims for protection, and a sale of the timber from the field cleared may be justly made in compensation for clearing and bringing it into cultivation. But it seems altogether unjust that a particular tenant should take off the timber without any adequate compensation to the estate for the loss of it; for he takes in that case not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself, and that, too, which imparts to it its chief value.

The rule of pleading in such actions as this, is that if the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion. (*Jackson v. Peshed*, 1 M. & S. 221; *Potts v. Clark*, 1 Spencer, 542; 2 Dutcher, 266.) Are the acts complained of as wrongful of such a nature as necessarily to result in an injury to the reversionary interest? The petition charges that the defendant cut down and carried away all the valuable rail timber, and that the value of the timber so carried away is three hundred dollars, and that the land in consequence thereof is diminished in value to the amount of six hundred dollars.

It is objected that the petition fails to show that the cutting of the timber was not necessary to the profitable enjoy-

ment of the land, or that it was not done for the purpose of cultivation, and that it is not alleged that the land is valuable for any purpose except the timber. As it respects the first of these objections to the petition, it is conceived that the profitable enjoyment of the land is not the proper criterion to determine the question of waste. There may be waste where there is such profitable enjoyment, and there may be profitable enjoyment without waste. The cutting of the timber may have been necessary to the profitable enjoyment of the land according to the tenant's standard of profit, and yet have been a great outrage upon the rights of the reversioner. It may have been more profitable to the tenant to have cut down and taken away the valuable timber, as the petition alleges, than to have used it in clearing the land or some portion of it. As to the next objection that the petition is defective in not alleging that the timber was not cut for the purpose of cultivation, we think it clearly appears, though not so expressly stated, that it was not for this purpose. The defendant had purchased the interest of one of the owners in fee, being one-fourth of the tract of two hundred acres, which, under an order of partition, had been set-off to him, and thus merged his life estate as to that part in the fee, and upon the remaining portion of said tract, one hundred and fifty acres, the waste is alleged to have been committed. And the averment that all the valuable rail timber was cut down and carried away clearly enough negatives the idea of its having been used in clearing the land or for any other purpose on the premises. The other objection, that there is no allegation that the land was not valuable for any other purpose except timber, is not well taken; for if the land is valuable for the timber only, it would surely be waste for a tenant to cut and carry away all the timber of any value. If useful for the timber alone, the tenant must in that case, as in all others, respect the rights of the owner of the inheritance, and his enjoyment of it must be regulated accordingly. The other judges concurring, the judgment will be reversed and the cause remanded.

## THE STATE, Appellant, v. COWAN, Respondent.

1. The general assembly has power under the constitution to create municipal corporations and to confer upon them the authority to pass police regulations and to punish persons for their violation.
2. If a municipal corporation created by the law of this state should take cognizance of an act made an offence by its ordinances and punish it, the person thus punished can not be subjected again, under the general law of the state, to punishment for the same act or offence.
3. The general assembly has power under the constitution to enact that, for offences of the grade of misdemeanors, persons may be proceeded against criminally either by indictment or by information.
4. Although by the general law of the state persons charged with certain offences of the grade of misdemeanors must be proceeded against criminally by indictment, yet the general assembly may grant to municipal corporations the power to ordain that persons charged with such offences may be proceeded against criminally by information. The general state law and the municipal ordinance may have a concurrent operation.

*Appeal from Polk Circuit Court.*

This was an indictment founded upon the fifty-fourth section of the eighth article of the act concerning crimes and punishments. The sixth and seventh sections of the act incorporating the town of Bolivar are as follows: "Sec. 6. The board of trustees shall have power to pass by-laws and ordinances, to open and form public squares, avenues, drains and sewers, and to keep the same clean and in order; to provide for the general health of its inhabitants; to restrain and prohibit dram-shops, tippling houses, gambling and gaming houses, bawdy houses and houses of ill-fame, and other disorderly houses, within the limits of said town; to tax and license circus shows, theatricals and other amusements; to restrain and prevent the meeting of slaves; to establish night watches and patrols; to prevent the firing of fire-arms and other explosive compounds, and to prohibit furious and other unnecessary riding of any horse or other animal in said town, or such part thereof as they may think proper; to impose fines and appropriate fines, forfeitures and penalties for breach of their ordinances, for the regulation of the police

of said town as they shall deem necessary, not repugnant or contrary to the laws of the land. Sec. 7. The trustees shall have power to pass all ordinances which may be necessary to carry any provision of this act into effect, and also to pass any ordinance usual or necessary for the well-being of the town." (Sess. Acts, 1855, Adj. Sess. p. 286.)

The following is the ordinance set forth in the plea in bar: "Ordinance 14. Be it ordained by the board of trustees of the town of Bolivar, If any person or persons shall ride furiously through the streets, alleys, or around the public square, by galloping or running any horse or other animal, or shall drive any vehicle in a furious or unbecoming manner within the limits of the town of Bolivar, shall be deemed guilty of a violation of this ordinance, and such person or persons shall be fined in a sum of not less than two nor more than five dollars, or be imprisoned not more than five days, or by both such fine and imprisonment, together with costs for each offence."

*Knott*, (attorney general,) for the State.

I. This cause was submitted to the court upon a brief filed in behalf of the State at a former term by Attorney General Ewing, in which it was contended that the demurrer was improperly overruled; that the plea in bar was defective; that it did not show that the town authorities had jurisdiction; that no affidavit charging an offence, nor any judgment or proceedings of the justice are set out in the plea; no organization of the town authorities is averred. The powers conferred by the act of incorporation in relation to police are subordinate to the power of the legislature over the same subject, and that power has been exercised. The act of incorporation confers no exclusive jurisdiction on the town authorities over the offence for which defendant was indicted. (Sess. Acts, 1855, Adj. Sess. 286; *Harmon v. State*, 11 Mo. 527, *St. Louis v. Bentz*, 11 Mo. 61; *Baldwin v. Green*, 10 Mo. 410; *City of St. Louis v. Cafferatta*, 24 Mo. 96; 8 Ala. 516; 6 Ala. 902; 1 Wend. 261; 12 B. Monr. 25; 14 Ala. 403.)

SCOTT, Judge, delivered the opinion of the court.

In the year 1855 the town of Bolivar, in Polk county, was incorporated among others, with the power to regulate its police. In pursuance to this authority the town prohibited, by an ordinance, furious riding through the streets, alleys, or around the public square, under a penalty of not less than two, nor more than five dollars, or imprisonment for not more than three days, or by both such fine and imprisonment. The defendant Cowan violated this ordinance, and was fined five dollars therefor, which he paid and was discharged. He was afterwards indicted by the grand jury of Polk county for the same act under the law of the state prohibiting the running of horses at great speed upon the public roads and highways. To this indictment he pleaded in abatement his former conviction under the ordinance above mentioned. To this plea there was a demurrer, and the demurrer being overruled, the State appealed.

We do not see how any question can arise in this case as to the jurisdiction of the corporate authorities over this offence, if it is competent to the legislature to create municipal corporations and to confer on them the power by ordinance to regulate their police. Surely the right to exercise such a power can not be seriously questioned. If this corporation thus established by law takes cognizance of an act made an offence by its ordinances, and punishes it, the person thus punished can not be subjected to punishment again for the same act or offence. The constitution forbids that a person shall be twice punished for the same offence. To hold that a party can be prosecuted for an act under the state laws after he has been punished for the same act by the municipal corporation within whose limits the act was done, would be to overthrow the power of the general assembly to create corporations to aid in the management of the affairs of the state. For a power in the state to punish, after a punishment had been inflicted by the corporate authorities, could only find a support in the assumption that all the proceed-



ings on the part of the corporation were null and void. The circumstance that the municipal authorities have not exclusive jurisdiction over the acts which constitute offences within their limits does not affect the question. It is enough that their jurisdiction is not excluded. If it exists, although it may be concurrent, if it is exercised it is valid and binding, so long as it is a constitutional principle, that no man may be punished twice for the same offence.

The exercise of concurrent legislative and judicial powers over the same subjects within the same limits may sometimes lead to conflicts and embarrassments; but there is more safety to the community in two conservators of the peace than in one. Besides, there are so many municipal corporations whose powers of government are so feebly executed that it would be unsafe to confide to them exclusive powers of making and executing laws within their limits on the subjects within their jurisdiction. This, however, is a matter within the control of the general assembly, and may be regulated according to the exigencies of the various municipalities in the state. (*State v. Simonds*, 3 Mo. 413; *State v. Payne*, 4 Mo. 376; *Baldwin v. Greene*, 10 Mo. 410; *Harrison v. The State*, 9 Mo. 526.) There is nothing in the case of the *City of St. Louis v. Cafferatta*, 24 Mo. 94, which conflicts with the views above expressed, but, on the contrary, the tone of the opinion there given is in strict harmony with them. Nor is there any intimation or expression in that opinion from which it may be inferred that a person, punished under an ordinance for an offence, may for the same offence be punished in the state courts. There was no such point made, nor did the facts warrant any expression of opinion in relation to it. That case merely decided that a certain ordinance of the city was not repugnant to a general law of the state.

It may be argued that the ordinance in this case is repugnant to that provision in the bill of rights which declares that no person can, for an indictable offence, be proceeded against criminally by information, except in cases arising in



the land or naval forces, or in the militia when in actual service in time of war or public danger, or by leave of the court, for oppression or misdemeanor in office; that the offence prohibited by the ordinance is indictable under the statute laws of this state; and that the legislature could not authorize a municipal corporation to punish it on information, but only by indictment, otherwise the constitutional provision might be evaded. If an offence, which by the statute law is punished in such a way, or is of such a grade, that the offender can not be proceeded against but by indictment, is made by a municipal corporation punishable in a manner, or reduced to a grade, that, under the constitution, the offender might be prosecuted on information, then he has no cause of complaint against the ordinance under which he is tried. It is a question for the state, and affects her alone, how far she will permit municipal corporations, by their ordinances, to mitigate the punishments which she inflicts by her general laws; but if she will allow it, there can be no valid objection against such a course on the part of the offender, as the punishment, which he undergoes at the hands of the municipal body, exempts him from prosecution under the state laws. In such a case the offender is in no worse situation than if there was no state law in force on the subject. Suffering only such a punishment and in such a way as may be imposed by the constitution, he is not affected by the existence of the state law, whose operation is suspended as to him by the punishment which he undergoes by virtue of the ordinance of the municipal body. If, then, as we have before endeavored to show, the corporation may substitute its ordinances for the law of the state, and if the state can constitutionally make the offence punishable by information, there can be no force in this objection founded on the constitution, as the offence is not an indictable one under the ordinance.

The meaning of the words "indictable offence" in the clause of the constitution above cited was a long time a subject of discussion in this state. But the case of the

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State v. Ledford, 3 Mo. 73, which has been long acquiesced in, must be considered as having settled the doctrine that, as to misdemeanors, the general assembly may make them punishable either by indictment or information. This is the obvious result of that case, and though the reason given may not be satisfactory, yet there are both reason and the opinion of others in support of it. The point was not made in the above cited cases of the State v. Simonds and the State v. Payne, but they can only be sustained on the assumption that it was competent to the legislature, through the instrumentality of municipal bodies, to make misdemeanors punishable by information. One reason in support of this construction is, that the clause itself allows misdemeanors of a high grade and severely punished, and which were indictable by the common law, though also punishable on information, to be prosecuted on an information. If misdemeanors of a high grade can be punished under an information, there is no reason why those of a minor grade and less severely punished should not be punished in the same way. Misdemeanors might, by the old common law, which was always a favorite of the people, be punished by way of information, while Magna Charta forbade that felonies should be prosecuted in any other manner than by indictment or presentment. (Story on the Constitution, secs. 1784, 1786; 4 Black. 409.) There is a provision in the bill of rights of the state of Tennessee, which declares that no one shall be put to answer any criminal charge except by presentment or indictment. There it was held, that these words did not prohibit the legislature from dispensing with those modes of prosecution in cases of misdemeanors. This conclusion was arrived at by examination of the principles of the old common law in relation to the prosecution of offenders. (Maginnis v. The State, 9 Hump. 43.) A careful perusal of the case of Jefferson City v. Coatmere, 9 Mo. 683, will satisfy any one that it was not decided on a ground which conflicts with this opinion. The foundation of the judgment was, that there was no authority conferred by the

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State v. Hambleton.—State v. Tilton.

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charter on the city to pass the ordinance under which Coatsmere was convicted. Had there been such authority, we must come to the conclusion that the judgment of the court would have been otherwise.

Judgment affirmed; Judge Napton concurring; Judge Ewing not sitting, having been counsel for the State.

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THE STATE, Appellant, v. HAMBLETON, Respondent.

1. State v. Cowan, ante, p. 330, affirmed.

*Appeal from Polk Circuit Court.*

SCOTT, Judge, delivered the opinion of the court.

For my opinion in this case, see my opinion filed in the case of the State of Missouri v. Cowan, decided at this term. Judgment affirmed; Judge Ewing not sitting, having been counsel for the State.

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THE STATE, Appellant, v. TILTON, Respondent.

1. The State v. Cowan, ante, p. 330, affirmed.

*Appeal from Polk Circuit Court.*

Knott, (attorney general,) for the State.

SCOTT, Judge, delivered the opinion of the court.

For my opinion in this case, see the opinion filed in the case of the State of Missouri v. Cowan, decided at this term. Judge Ewing not sitting, having been counsel for the State.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Plaintiff in Error, v. ROWLAND *et al.*, Defendants in Error.

1. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph Railroad Company, under its charter, to obtain a condemnation of land, the report of a set of commissioners or viewers is set aside, the judge in ordering a review must appoint a *new* set of viewers. (Sess. Acts, 1857, p. 250, § 9.)
2. Where the judge, upon the making of the report of the viewers, sets the same aside on the ground that the damages had not been estimated in the mode required by the law, the award of damages being conditional, and sends back the same viewers with instructions as to the rule in assessing damages, this would not be a review within the meaning of the charter, and would not require the appointment of a new set of viewers, nor would it come within that provision of the charter that provides that "not more than one review shall be granted to the same person."

*Error to Macon Circuit Court.*

The facts are sufficiently set forth in the opinion of the court.

*Lamb & Lakenan*, for plaintiff in error.

I. The courts will take cognizance of cases like this brought up by *certiorari*. (27 Mo. 322.) These proceedings are before the judge *ex officio*, not before the court, either in or out of term. The judge had no right to order four views of the land, nor to appoint the same viewers twice, or to order them to make a second report. The first report of Morrow, Gipson & Morrow should have been permitted to stand. The right to a review was exhausted on each side. In their second report the viewers were misled by the instructions of the court. The judge had no right to instruct them. The instructions were wrong.

*Prewitt*, for defendants in error.

I. A writ of error does not lie in this case. (27 Mo. 327.) The first report made by Morrow, Gipson & Morrow was illegal. No judgment could have been entered upon it. All that could be done was to have the reviewers make a new

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Hannibal and St. Joseph Railroad Co. v. Rowland.

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report. The judge had the right to instruct the viewers. Whether the judge had or not, the instructions could not have done harm. (See 25 Mo. 544.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case arises out of the construction of the ninth section of the act to incorporate the Louisiana and Columbia Railroad, which act was subsequently adopted as the charter of the Hannibal and St. Joseph Railroad Company.

Where the company and the proprietor of the land through which the road is proposed to be run can not agree upon the damages, the circuit judge of the county where the land lies is required, upon the application of the company, to appoint three discreet citizens to go upon the land and report to him the damages. Upon objections being filed to the report within five days, the judge is authorized, if he is satisfied that the objections are "sufficient and legal," to appoint a new board of commissioners or viewers, or he may enter judgment upon the first report. The only restriction upon the power of the judge in this matter is, that "not more than one review shall be granted to the same party." (Sess. Acts, 1837, p. 250.)

In this case, upon the application of the company and due notice to the proprietors, the judge appointed three citizens—Pool, Walker and Reynolds—to examine the land and report the damages. These commissioners reported the damages to the proprietors to be one hundred and fifty dollars. At the instance of the proprietors, Rowland and Clay, who were dissatisfied with the damages, the judge appointed three other citizens—Fox, Smith and Winn—to review the road and assess the damages, and this second board reported the damages at seven hundred dollars. The company being dissatisfied with this report, the judge, at their instance, appointed a third board, consisting of Morrow, Gibson and Dysart, and a fourth person named to act in the event of

the inability or failure of either of the persons named. This board reported that no damages would be done the proprietors by the construction of the road, provided the company would make three cattle-guards wherever said proprietors would designate, and two crossings—one near the buildings and the other at a place to be designated by the proprietors. This report was set aside, and the court sent the same commissioners with instructions as to the rule of damages, and they returned reporting the damages at seven hundred dollars, and this report was confirmed.

The company insist that upon the coming in of the third report by Morrow, Gibson and Morrow (substituted for Dy-sart) the power of the judge was exhausted, and therefore they moved for a judgment upon the report of the last board.

The act seems to leave it very much to the discretion of the judge to determine upon granting a review or refusing one. The expressions used by the act to designate the character of objections to a report which will authorize the judge to set it aside and appoint a new set of commissioners, are very vague and indefinite. The objections must be "sufficient and legal," and this is all the description of them given in the act. It is plain, however, that the review spoken of in the act is in all cases to be made by a new set of commissioners. The language is "he shall order a review by three other viewers, who shall proceed in the same manner as hereinbefore provided, *but not more than one review shall be granted to the same person.*"

When the circuit judge for Macon county, then, sent back the commissioners, Morrow, Gibson and Morrow, to make another report, it was not a review within the meaning of this law. The report first made by these commissioners was not deemed to be in conformity to the law; the damages were not in fact estimated in the mode which the law required. The award was a conditional one, which could only be made effectual by an agreement between the parties. The commissioners were therefore sent back to report an estimate of the damages in money. This was not granting to the



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proprietors a second review, but merely seeing that the report of the commissioners appointed at the instance of the Railroad Company was in conformity to law.

The judgment of the circuit court is affirmed ; the other judges concur.

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IRVIN, Respondent, v. RIDDLESBURGER, Appellant.

1. A. sued B. to recover the value of carpentry work done for the latter ; B. in his answer set up that the alleged work was done in so unworkmanlike a manner as to be valueless, and claimed by way of counter claim the sum of six hundred and four dollars that he had advanced to A. during the progress of the work, and that was allowed as a credit in the account filed with plaintiff's petition ; to this counter claim no reply was filed. The court, at B.'s instance, instructed the jury that if the six hundred and four dollars advanced by B. was more than the work done was worth, they should "find for defendant whatever amount they may consider said work worth less than said sum." The jury found for plaintiff the balance claimed to be due him. *Held*, that the defendant was not, under the circumstances, aggrieved by the refusal of the court to instruct the jury that the allegations of the answer with respect to the set-off or counter claim were admitted by the pleadings to be true, *there being no reply thereto*.
2. The supreme court will not grant new trials on the ground that the verdicts of juries are against the weight of evidence.

*Appeal from Kansas City Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

*Ryland & Son, Chrisman & Comingo*, for appellant.

*Smith & Bouton*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

There are two grounds upon which it has been urged that this judgment ought to be reversed. The first is, that the court refused to give the third instruction asked by the defendant, which, in substance, declared to the jury that, as the defendant's counter claim for six hundred and four dollars was not replied to, they would consider it as admitted and

render their verdict accordingly. The other ground relied on is that the verdict is against the evidence.

In relation to the first point, it seems to us that a concession of the propriety of this instruction would not lead to a reversal of the judgment. Admitting that the defendant's answer contained new matter constituting a counter claim, within the meaning of the fifteenth section of the sixth article of the practice act, (R. C. 1855, p. 1238,) and that the plaintiff's failure to reply brought the case within the sixteenth section of the same article, yet it could certainly tend to no good purpose, under the circumstances of this case, to send the case back to have this error corrected. The jury passed upon the counter claim under instructions from the court and rejected it. The case was tried precisely as though a replication had been put in.

The plaintiff's bill of particulars gave the defendant credit for the six hundred and four dollars which he claimed to have advanced on the work as it progressed, and the jury allowed the same as a credit; but as they allowed the bill, after deducting the credit, they of course found against the counter claim. The counter claim set up that the work was so badly executed by plaintiff that it was worth nothing, and therefore that the six hundred and four dollars advanced ought to be returned. But the jury, under the allegations of plaintiff's petition and the instructions given at defendant's request, found that the work was done in a workman-like manner, and that the prices charged were reasonable. If the case is sent back to have a formal replication filed, which, of course, would have been done on the trial but through inadvertence, we have no right to anticipate any different result from that reached before, unless, indeed, the verdict was against the evidence before; and that is another and distinct ground for reversal, and must stand or fall by itself.

The practice of this court in relation to the verdicts of juries, which the circuit courts refuse to set aside, is so well settled that it is needless to refer to the cases. There is

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nothing in the circumstances of the present case to induce or authorize any relaxation of the rule. The action is brought to recover the amount of a carpenter's bill for work done and materials furnished, and a jury is the best tribunal to try cases of this kind. The specified ground of complaint in this case shows the folly of any interference on the part of this court in such cases. It is alleged here that there was no evidence to support the four or five items following the first in the bill, amounting to about three hundred and fifty dollars. That these items are for furnishing the timber for the girders, posts, sills, &c., when there was not only no proof that the plaintiff furnished the timber, but it clearly was proved by his own witnesses that the defendant furnished all the materials except nails and weatherboarding. If these items were understood at the trial to mean charges for materials, instead of work done on materials, and the materials were not in fact furnished by plaintiff, it is most remarkable that a fact which could be so easily established should be left in doubt; and if overlooked upon the trial before the jury, it is singular that, upon a motion for a new trial, the failure to prove so large a portion of the claim should have escaped the attention of the court. But we suppose the items referred to are not designed as charges for materials but for some work bestowed on them, probably framing and raising them; and, upon this hypothesis, we find on looking into the testimony that the first witness introduced by the plaintiff proves the charges to have been reasonable and customary. It is true there is no direct proof that the defendant did this work; but it was charged and not denied in defendant's answer. The answer did not deny that the work was done, but admitted it was done; but set up as a defence that it was done in so bungling a manner as to be worth nothing.

There is no ground, therefore, for disturbing this verdict on account of its being against evidence or unsupported by evidence. The jury and court before whom this case was tried understood the facts much better than we do; but as the case has been sometime before the court, and the point

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has been urged with great apparent confidence by the appellant, we have looked with more than ordinary care into the bill of exceptions to see if there was, as alleged, a total failure of evidence, and the result has been, as stated, that we do not feel warranted in disturbing the verdict upon any of the grounds suggested.

The judgment is affirmed; the other judges concurring.

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CAMPBELL, BY HIS NEXT FRIEND, Defendant in Error, v. GARTON, Plaintiff in Error.

1. Where a judgment by default has been regularly rendered, a motion to set the same aside should be accompanied by an affidavit showing a meritorious defence and that there has been due diligence.
2. A petition for a review will not lie under section 13 of article 12 of the act concerning practice in civil cases (R. C. 1855, p. 1280, § 13), if the defendant has been regularly summoned as required by law, or has appeared to the suit, and interlocutory and final judgment shall have regularly been rendered against him.

*Error to Pettis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Ford and Field*, for plaintiff in error.

The petition should have been granted. The defendant never appeared to the action. The petition sets forth all the facts required by the statute. The motion to set aside the interlocutory judgment was not an appearance. There was no negligence on the part of defendant. In addition to the facts set forth as required by the sixteenth section of the twelfth article, the petition embraces other good cause for setting aside the judgment, the discovery of new and material evidence. (Sto. Eq. Pl. § 404, 413; 2 Smith, Ch. Pr. 50, 60; Mitf. Ch. Pr. 127; Barton Eq. 215; 4 Hen. & Munf. 242; 2 id. 589; 2 J. J. Marsh. 492; 8 B. Monr. 343.)

*Welch & Hicks*, for defendant in error.

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I. The court committed no error in dismissing the petition of review.

EWING, Judge, delivered the opinion of the court.

Defendant in error sued plaintiff in error in ejectment, in which there was personal service on the defendant, and judgment by default rendered at the November term, 1857, which was made final at the next regular term thereafter. On the same day plaintiff in error filed his motion to set aside the judgment by default and for leave to file an answer, which was overruled. The motion was based on an alleged mistake or misunderstanding of counsel, to whom plaintiff in error had spoken, and who failed to file an answer. The motion was not supported by affidavit. At the April term, 1858, the judgment having been made final, on the 8th of September, 1859, plaintiff in error filed in the clerk's office of said court a petition asking the court to set aside the judgment by default and the final judgment, and to permit him to answer said petition. At the next term, November, 1859, the defendant in error filed his answer denying that plaintiff was entitled to the relief sought by his petition. This answer, on motion of the plaintiff in error, was stricken out. The petition for a review was then overruled, and the court refused to set aside the judgment, to which opinion of the court exceptions were saved, and the cause is before us on a writ of error.

The petition for a review is based upon the following grounds: First, that the petitioner never appeared to the action, nor was he made a party as the representative of one who did appear to the action; second, he was guilty of no negligence in not appearing to said suit, and that since the final judgment was rendered he has obtained the patent from the United States to the land in controversy; that he was the legal owner of the land; and that he had a good defence to the action. This was not a case for the proceeding by a petition for review, and the plaintiff in error misconceived his remedy in resorting to it. A petition for re-

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Grinnan v. Mockbee.

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view is the appropriate remedy where an interlocutory judgment shall be made and a final judgment is entered thereon against any defendant who shall not have been summoned as required by this act, or who shall not have appeared to the suit, or have been made a party as the representative of one who shall have been summoned or appeared. (R. C. 1855, p. 1280, art. 12, § 13.) The record shows that the plaintiff in error, defendant in the ejectment suit, was duly summoned as required by law ; and it also shows that he appeared to the action. But having been summoned was sufficient ; and having failed to answer, his proper course was by motion to set aside the interlocutory judgment. (R. C. 1855, p. 1278, § 4, 5.) Such a motion, it is true, was filed and overruled, and from the judgment of the court in overruling the motion the plaintiff could have appealed if the court had committed error. The motion, however, (which was not sustained by affidavit,) discloses no merits whatever. The only ground alleged is, that the defendant had spoken to and employed an attorney to file an answer and defend said suit, and that said counsel, by misunderstanding or mistake, did not file any answer. It does not appear from this motion that there was any defence to the action, or that the defendant would have been benefited had he been permitted to file an answer. In all cases of this kind there should be an affidavit of merits and that there has been due diligence. (7 Mo. 6, 27 ; 8 Mo. 688 ; 3 Mo. 263 ; 10 Mo. 394 ; 11 Mo. 193.)

The judgment is affirmed ; Judge Scott concurring. Judge Napton, having been of counsel, did not sit in this case.

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GRINNAN, Respondent, v. MOCKBEE, Appellant.

1. Where a party to a suit seeks to read in evidence a deposition taken in the cause on the ground that the witness resides at a greater distance than forty miles from the place of trial, he must prove that fact ; the statement of the deponent in his deposition is not admissible in evidence for that purpose.



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Grinnan v. Mockbee.

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*Appeal from Jackson Circuit Court.*

The facts sufficiently appear in the opinion of the court.  
*Hovey and Ryland*, for appellant.

I. The deposition of Mockbee was improperly read in evidence.

*Chrisman & Comingo*, for respondent.

I. The testimony of the defendant Mockbee shows conclusively that when the deposition was taken he was beyond the jurisdiction of the court. The presumption is that he continued beyond the court's jurisdiction. It devolved upon the defendant to show a different place of residence. (10 Barb. 175.) The testimony offered by defendant is insufficient to show that he had moved within the jurisdiction of the court. It was a surprise upon plaintiff. It was a question of fact to be determined by the weight of testimony. The decision of the court ought not to be disturbed. (9 Mo. 375; 13 Mo. 308; 15 Mo. 400.)

EWING, Judge, delivered the opinion of the court.

The only question for our consideration is the action of the circuit court in permitting the deposition of Mockbee to be read in evidence.

The bill of exceptions shows that when the respondent offered to read the deposition, the appellant objected on the ground that the deponent was then living within forty miles from the place of trial, and that, upon examination of the deposition, it appeared to the court that at the time the same was taken (during the last year) the deponent stated therein that he lived about fifty miles from the place of trial. The court, thereupon, required the appellant to prove that the deponent had changed his residence since taking the deposition, and that he then lived within forty miles of Independence.

When a party relies on a deposition, he must, before he can be permitted to use it as evidence, show all the facts

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upon which its admissibility depends. Among these is the fact that the deponent is not within forty miles from the place of trial. The onus of proving this was upon the respondent. There was no evidence, or no competent evidence, as to the distance the deponent lived from the place of trial when his deposition was taken. His own statement in the deposition was not admissible for that purpose. The admissibility of the deposition was the question to be determined, and to look into the deposition for evidence of the facts upon which its admissibility depended was assuming the point to be decided.

The statement of the officer taking the deposition as to the deponent's place of residence is made *prima facie* evidence of that fact, and, under some circumstances, the court would take judicial notice that his residence was more than forty miles from the place of trial, but certainly not in such a case as the one before us.

It is deemed unnecessary to notice the testimony of the witness Rice introduced by the appellant. The judgment will be reversed and the cause remanded.

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BRYANT *et al.*, Plaintiffs in Error, v. HARDING *et al.*, Defendants in Error.

1. Where a judgment by confession is rendered, under a power of attorney from the debtor, as authorized by the 24th section of the 12th article of the act concerning practice (R. C. 1855, p. 1283,) the affidavit required of the plaintiff must be made by himself; the attorney in fact or agent of the plaintiff in the confessed judgment can not make the required affidavit.
2. Where a judgment is confessed irregularly, other judgment creditors are entitled to have the same set aside on motion.

*Error to Clay Circuit Court.*

On the 27th of April, 1858, one Murray gave James H. Moss a power of attorney to confess a judgment against him in favor of Roger E. Harding, George C. Kimbrough and

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Richard F. Toomer. At the April term, 1858, of the Clay circuit court, a judgment was confessed under this power. The affidavit on the part of the plaintiffs in the judgment, Harding, Kimbrough and Toomer, was made by their agent Thomas McCarty. At the same term Edward V. Bryan and others, alleging that they were judgment creditors of Murray, moved the court to set aside the judgment by confession on the ground that plaintiffs therein had not made affidavit as required by law. The court overruled the motion.

*Hovey*, for plaintiffs in error.

I. The judgment by confession ought to have been set aside. The plaintiff and not the agent must make the affidavit. (R. C. 1855, p. 1282, § 24.)

*Parsons & Edmunds*, for defendants in error.

I. The affidavit was sufficient. It was as valid as if made by the plaintiffs themselves or either of them. The plaintiffs in this motion could not take advantage of any irregularity in the judgment, if any existed, by motion. Their remedy was in the nature of a bill in equity. The motion was properly overruled.

EWING, Judge, delivered the opinion of the court.

The question in this case involves the interpretation of section 24 of article 12 of our practice act, respecting the confession of judgments. Was the agent of the defendants in error authorized to make the affidavit required by the statute in such cases? The statute authorizes a judgment by confession, for a debt owing upon a note, bond, or bill of exchange, under the power of attorney of the debtor acknowledged as required of deeds of land for their record and filed in the court rendering the judgment at the time of its rendition, together with the note, bond or bill of exchange and the affidavit of the *plaintiff* that the debt is *bona fide*, for a fair and valuable consideration after allowing all just credits and set-offs.

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The restrictions imposed by the statute were designed to insure good faith and to prevent fraud ; and, although there may be cases in which an agent could make the affidavit advisedly and with as much propriety as the plaintiff himself, yet, in the abuse that would obviously result in others, we find a sufficient reason for not extending the interpretation of the statute beyond the literal import of its terms, and for not inferring an intent unwarranted by their plain sense. It is not pretended that there is any *express* authority for an agent of the plaintiff to make the affidavit ; and it is not perceived how it can be reasonably implied from any thing in the statute. On the contrary, the intent of the legislature would seem not to be susceptible of a clearer expression than is contained in the section quoted, without the use of language expressly negating such authority. It will be observed that the first clause of the section is very specific as it respects the confession of judgments by the debtor under power of attorney and the manner in which the power is to be authenticated ; but when, in the last clause, it provides what is to be done by the creditor, there is nothing whatever said about an agent ; thereby showing that, in expressly recognizing the intervention of an agent in the one case and not in the other, it was not intended that the affidavit should be made by another than the plaintiff in *propria persona*. This view is also sustained, we think, by another provision of the practice act, which expressly permits a *pleading* to be verified by the affidavit of the party, his agent or attorney. (R. C. 1855, p. —, art. 6, § 20,) which makes the silence of the provision we are considering respecting an agent more significant of the legislative intent.

The proceeding by motion to set aside the judgment was a proper one, and there is nothing in the objection of counsel on this point.

The judgment is reversed ; the other judges concurring.

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Tucker v. Tucker.

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TUCKER, Plaintiff in Error, v. TUCKER *et al.*, Defendants in Error.

1. A deed of gift of slaves made by a husband in anticipation of death and with a view to defraud his widow of her dower in such slaves will be held void as against the widow.
2. Where a person, in anticipation of death, and with a view to defraud his widow of her dower, executes, as part of the same transaction, separate deeds of gift of slaves to his children, a petition in a suit instituted by the widow against all the grantees in said deeds to obtain an annulment thereof and an assignment of dower will not be bad for multifariousness because the defendants have separate and distinct interests under the deeds.

*Error to Cooper Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Douglass & Hayden*, for plaintiff in error.

I. The demurrer should have been overruled. The petition is not multifarious. (Sto. Eq. Pl. § 285, 286, 531, 540; Adams Eq. 309, 310; Brinkerhoff v. Brown, 6 Johns. Ch. 368; Bigbee v. Sargent, 23 Maine, 269; Dimmoch v. Bixley, 20 Pick. 368; Curtis v. Tyler, 9 Paige, 432; Gaines v. Chew, 2 How. 619; Oliver v. Pratt, 3 How. 411; 4 Mo. 116; Bray v. Thatcher, 28 Mo. 129; Martin v. Martin, 13 Mo. 36.)

II. The petition states facts sufficient to constitute a cause of action. They bring this case within the principle decided by the cases of Davis v. Davis, 5 Mo. 183, and Stone v. Stone, 18 Mo. 389. See Lightfoot's Exec'rs v. Colgan & wife, 5 Munf. 558.

*Adams, Stephens & Vest*, for defendants in error. -

I. At common law and under our statute dower attaches to land during coverture. Our statute only endows the widow of personalty belonging to the husband at the death. Any disposition made during the life of the husband will defeat dower. (16 Mo. 250; R. C. 1855, p. 668.) The term dower properly only applies to real estate. The marriage vests the wife with no interest in her husband's per-

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sonalty. The statute giving her dower in personalty only applies to that remaining undisposed of at the time of his death. It is not the intent of the law to abridge in any way the right of the husband to dispose of his personalty by any disposition to take effect irrevocably during his lifetime. She has no interest inchoate or otherwise. The widow can only question such acts and conveyances of her husband as do not pass his estate away from him in his lifetime, such as are made *in extremis* and such as might be set aside on the ground of imbecility and are in effect wills in disguise. It is upon this ground that the cases of Davis v. Davis and Stone v. Stone were decided. The allegations of the petition do not bring this case within the rule referred to. She merely alleges that these deeds were made in anticipation of death and to defraud her of her rights. It is not alleged that they were made *in extremis* or in *immediate* anticipation of death, and are wills in disguise. They were made fifteen months or more before death. When does the husband's right to dispose of his property cease?

II. The petition is multifarious. The demurrer was properly sustained. (See R. C. 1855, p. 1228; 20 Mo. 234; 26 Mo. 72; 17 Mo. 231; 11 Mo. 269; Sto. Eq. Pl. § 271; 16 Mo. 251.)

EWING, Judge, delivered the opinion of the court.

There are two questions in this case: first, does the petition show a cause of action; second, is it objectionable for multifariousness?

It appears from the petition that the decedent, Alexander Tucker, died in June, 1859, leaving the plaintiff Sarah Tucker his widow, Benjamin H. and William H. Tucker his two sons, and three grand-children, the issue of a deceased daughter, who are minors; that the decedent on the 7th of April, 1858, being possessed and legal owner of certain slaves, ten in number, by his deed of gift of said date, with the view and for the intent and purpose fraudulently to deprive and defeat the plaintiff of her right of dower in and to



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said slaves, conveyed five of them, which are named, to the defendant W. H. Tucker, as trustee, in trust for the use of his three grand-children, who are also made defendants—said intestate reserving to himself a life estate in said slaves, and retaining the possession, use and service thereof; that by another deed of gift, of the same date, for the purpose aforesaid, said decedent fraudulently conveyed to the defendants Benjamin H. and William H. Tucker, three of said slaves, reserving the possession, use and services thereof for and during his life; and that by a certain other deed dated January 5, 1858, the intestate conveyed to the plaintiff, to be enjoyed by her after the death of said intestate, with remainder in fee to the defendants, one of said slaves, reserving to him, the said intestate, the use of said slave during his life. The petition further alleges that, at the time of the execution of said deeds of gift, said intestate was, and long prior to that time had been, in a feeble and declining state of health, and was weak both in body and mind, and that said deeds were made by him in expectation and in anticipation of death and for the purpose aforesaid of depriving and defeating plaintiff of her right of dower in said slaves; that defendants colluded with the intestate, and exercised an undue influence and control over him, and induced him to make the deeds for the purpose stated.

It is conceded that in this state the husband has no power by will to deprive the widow of her dower in personal estate, no more than in real estate; and it is equally clear and well settled, since the decision in the case of *Davis v. Davis*, 5 Mo. 189, that the sense and intent of the statute on this subject applies not only to *wills* technically, but also to deeds if made with the intent to defeat the widow's dower; that if made for this purpose, the mere form or name of the instrument by which it is attempted is immaterial, and all such deeds are void as being in fraud of the widow's rights under the statute.

But although the husband is not permitted to deprive his wife of her dower in his personal estate by will, he has the

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undoubted right to alienate this kind of property during his life, without his wife's concurrence and disburdened from any claim of hers, if made *bona fide* and not as a device by which to retain the use and possession during life and at his death to place it beyond the reach of his widow. But if the transaction be merely colorable, or be accompanied with circumstances evincing fraud, the disposition will be void against her. In *Hall v. Hall*, 2 Vern. 276, the court said, if the goods are given absolutely by a freeman in his lifetime, they will stand good against the custom, under which the wife claimed; but if he has it in his power, as by the keeping of the deed, &c., or if he retains the possession of the goods or any part of them, this will be a fraud upon the custom. Keeping the deed in the husband's hands or retaining possession of the property after assignment, are marks of fraud. (*Smith v. Fellows*, 2 Atk. 62.) The reservation of a life interest in property assigned by deed is held to be evidence that the gift is in effect testamentary, and therefore a fraud upon the custom. (2 Ver. 612, 685.) Roper, in his work on *Husband and Wife* (2 vol. p. 17), states his conclusion on this subject to be, that if the act be accompanied with the delivery of the property, and every thing is done, so far as it can be, before the husband's death, to give effect to the transaction, and there is no reservation, and the husband divests himself of all interest in the property, then the act will be necessarily valid as a due exercise of his admitted right, whilst life remained, to dispose of his property in bar of the custom. The facts of this case as averred in the petition, we think, bring it within the influence of the principle laid down in *Davis v. Davis*, *supra*, and *Stone v. Stone*, 18 Mo. 389.

Though the instrument in the case before us is (like those in the cases just cited) in form a deed, and not technically a will, yet its execution was accompanied with such circumstances as evince a fraudulent intent, and are sufficient, if proved as they are alleged in the petition, to invalidate it. It has such characteristics of a testamentary

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disposition as to bring it as effectually within the prohibition of the statute as if it had all the technical requisites of a will. If the intent and effect of the deed are the same, the mere form or mode of accomplishing it is immaterial. The petition shows that the deeds were voluntary; that they were made in expectation and anticipation of death, when the decedent was in feeble and declining health; that the slaves, some nine in number, were conveyed to the defendants, who are his children and grand-children, reserving however to himself during his life the use and possession thereof; that one other slave was conveyed to plaintiff to be enjoyed after decedent's death, with remainder in fee to the defendants, but retaining in like manner the possession of this one also during his life. These conveyances are alleged to have been made to defraud the widow of her dower, and to have been the result of collusion between decedent and the defendants, and of undue influence exercised by them over him. And of the sufficiency of the facts alleged in the petition to constitute a cause of action, we entertain no doubt.

The objection that the petition is multifarious we think is not well taken. Although there are several deeds, and the property is claimed by the parties defendants under different instruments, and may to that extent be considered distinct transactions, yet they are transactions connected with the same general subject matter and subject of action, and therefore come within requirement of the statute. (R. C. 1855, p. —, art. 6, § 2.) There is one general right in the plaintiff, and the claim of the defendants to the property in controversy is so far identified, that if the claim of one is invalid, the claim of all is likewise invalid. The defendants are all alike concerned in sustaining the deeds conveying the property and defeating the plaintiff's action. It is true the property is held under distinct conveyances, but the gravamen of fraud equally applies to all of them. If one of the conveyances is fraudulent, all are fraudulent, and all the property thereby conveyed is affected by the plaintiff's claim of dower.

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The principle of allowing a plaintiff to bring many defendants before the court is that he claims one common right against all, and therefore the court allows him to bring all persons disputing that right before the court in one bill. (11 Mo. 270.) It is said a bill is objectionable for multifariousness when different matters having no connection with each other are joined in a bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which the suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested and with which they have no connection. (3 Barb. Ch. 432.) The objection of multifariousness is confined to cases where the cause of each defendant is entirely distinct and separate in its subject matter from that of his cofendants. A bill is not demurrable where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. (20 Pick. 368; 3 Iredell Eq. 611.) In *Brinkerhoff v. Brown*, 6 John. Ch. 156, the leading cases are reviewed and the subject discussed at length by Chancellor Kent, who says that the principle to be deduced from the cases is that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct. In *Whaley v. Dawson*, 2 Sch. & Lef. 367, the rule was declared to be that where there was a general right covering the whole case, the demurrer would not be allowed, though the defendants had separate and distinct rights. (See also to the same effect, *Curtis v. Tyler*, 5 Paige, 434; *Bray v. Thatcher*, 28 Mo. 129.)

The judgment will be reversed and the cause remanded; the other judges concurring.

RAGAN *et al.*, Defendants in Error, v. McCoy, Plaintiff in Error.

1. The trial of the issues raised in an action for the recovery of money only, to which the practice act of 1849 is applicable, is for the jury, unless a jury trial is waived; the jury should be allowed to try all the issues, the court declaring the law; it would be improper and irregular to submit portions of the issues to the jury and reserve the remainder for the determination of the court.
2. *Quere*, where a court appoints three commissioners to sell and convey land, and they make a sale as directed, and after the sale and before making of the deed two of the commissioners die, whether the deed of the surviving commissioner acknowledged in open court would be valid and effectual?
3. Where streets of a town have once been dedicated to the public, the proprietors can not resume the property in such streets; there may be a dedication to the public of the streets of a town although the proprietors laying out such town may not comply with the provisions of the act concerning the plats of towns and villages. (R. C. 1845, p. 1055.)
4. The acknowledgment of the plat of a town by the proprietors under the act of February 12, 1845, (R. C. 1845, p. 1055,) is not rendered defective by reason of a failure of the person taking the acknowledgment to state in the certificate the fact that the persons making the same were personally known to him to be the persons executing the plat.
5. Where two persons are tenants in common of land, and one of them receives a benefit therefrom, but in nowise interferes with the joint use of the land by the other, and does not affect its value in any manner, it would seem that he does not render himself liable to account to such other joint tenant for a proportionate share of the benefit received.

*Error to Clay Circuit Court.*

This was a suit commenced in the year 1853 by Jacob Ragan, F. P. McGee, William Gillis, Robert Campbell, and William B. Evans, against John C. McCoy and the unknown heirs of Henry Jobe, deceased. William B. Evans dying, his heirs were made parties plaintiff. The suit was originally commenced before the Jackson circuit court. It was transferred by change of venue to Clay county. Plaintiffs in their petition state that in the year 1838 an association was formed by certain individuals, (including some of the plaintiffs and McCoy, the defendant,) fourteen in number, for the purpose of purchasing a certain tract of land contain-

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ing about one hundred and fourteen acres; that when said land was offered for sale by the commissioners appointed by the Jackson circuit court they bought the same; that two of the three commissioners appointed to sell and convey said land, Peter Booth and Elliot Johnson, died before making a deed to the purchasers; that Robert Campbell, who was not one of the original purchasers, acquired the interests of three of those purchasers; that in August, 1843, James B. Davenport, the surviving commissioner, executed a deed conveying said land to the said purchasers, Robert Campbell being substituted in place of three of them, each of the eleven original purchasers receiving each one-fourteenth and Robert Campbell three-fourteenths. The petition then proceeds to set forth various conveyances by which, as is alleged, the title became distributed as follows: Ragan one-fourteenth, Evans one-fourteenth, McGee two-fourteenths, Gillis three-fourteenths, Campbell four-fourteenths, McCoy two fourteenths, and the said Jobe or his unknown heirs one-fourteenth; that on the 30th of April, 1846, the proprietors of said tract having previously laid off thereon the town (now city) of Kansas and made a regular plat of the same, a portion of said company, to-wit, Ragan, McGee, McCoy, Gillis, Jobe, and Evans, duly acknowledged said plat, and the same on said April 30, 1846, was filed in the office of the recorder of the county of Jackson; that by said plat and the certificate of acknowledgment thereon endorsed said proprietors reserved to themselves individually and collectively the exclusive right and privilege of ferriage on said town tract, and the exclusive right of landing and fastening all ferry-boats and other watercrafts used for the purpose of ferriage to the bank in front of said town; that they are as a company and as tenants in common jointly entitled to the ferry privileges and landing on this, the south, side of the Missouri river; that McCoy has taken possession of and has used and enjoyed the same for a long series of years, to-wit, since the filing of said plat, and has taken and used more than his due proportion of the benefit thereof or of the profits arising from said ferry; that



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said McCoy, having taken more than his due proportion of the profits or benefits arising from said ferry, is and was bound to pay to each of the plaintiffs his interest in the profits arising from said ferry; that McCoy refuses so to settle and pay over, although demand has been made; that said ferry privilege is and has been worth since April 30, 1846, at least nine hundred dollars; that he is liable to pay plaintiffs at least four hundred and fifty dollars as rent per year from said date.

The defendant McCoy by his answer denied that the interests of the several plaintiffs in the tract upon which the town of Kansas had been laid out were as charged; alleges that all of said land except a very small amount had been divided by agreement; denied that an effectual reservation had been made as charged; that the plaintiffs are jointly entitled to the ferry privilege; or that defendant has taken or received more than his due share or proportion of the benefit thereof or of the profits arising therefrom; or that he owes plaintiffs any thing whatever of profit arising from said ferry; or that the ferry privilege was worth the sum charged. By a supplemental answer defendant set up a dedication to the public of the land used for the purposes of a ferry long before the filing of the plat of 1846.

At the trial the court submitted to the jury the following issues: "First--The petition asserts and the answer denies that plaintiffs and defendant were tenants in common of the ferry privilege mentioned in the pleadings. Second--The petition asserts and the answer denies that the yearly value of the said ferry privilege was worth nine hundred dollars. The jury will find whether the said parties were tenants in common, and how much the yearly rent of said ferry privilege was worth."

In support of the issues the plaintiffs adduced in evidence various conveyances to themselves from various parties. They also introduced in evidence, against the objections of defendant, an original plat of the town of Kansas, on which the blocks and streets of the town were laid out. On the margin

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of the face of this plat was the following memorandum : "The proprietors reserve to themselves and to their heirs and assigns forever the exclusive right of ferriage on this town tract." On the back of this plat there was this certificate of acknowledgment : " State of Missouri, county of Jackson, ss. Personally appeared William Gillis, Fry J. McGee, John C. McCoy, Jacob Ragan, Henry Jobe, William B. Evans, before me, Walter Bates, a justice of the peace within and for the township of Kaw, county and state aforesaid, and severally acknowledged the within town plat to be their act and deed for the purposes therein set forth ; hereby conveying and granting for public use all the streets, alleys, squares and public grounds as shown on the within plat ; reserving, however, to themselves, individually and collectively, and to their heirs and assigns forever, the exclusive right and privilege of ferriage on said town tract, and the exclusive right of landing and fastening on said town tract all ferry-boats and other water-craft used for the purpose of ferriage on the bank in front of said town. Taken and certified this 30th day of April, 1846. Walter Bates, J. P." " Filed 30th day of April, 1846. S. D. Lucas, clerk." Plaintiffs also introduced T. A. Smart as a witness, who testified that in 1839 McCoy was keeping a ferry from the site of the town of Kansas to the opposite shore ; that he had kept it ever since ; that about that time the town of Kansas was laid out, and there was a public sale of lots according to a survey made by one Donahoe ; that nothing was said at the time of the sale of the lots of a reservation of ferry privileges ; that Front street has ever since been used as a street ; that McCoy was the owner of the land on the north side of the river ; that some of the plaintiffs ran a ferry across the river a part of the year before 1846 ; that he had never heard of McCoy's objecting to their running or landing their boats on his lands or the town site ; that up to 1846 the ferry privilege was worth nothing ; that since that time the ferry, including both sides of the river, was worth an annual rent of seven hundred dollars. The court refused to permit the

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witness to answer the question asked by defendant whether McCoy's keeping up the ferry had not been of immense advantage in building up the town of Kansas and enriching the owners of the site.

The plaintiffs offered in evidence the deed executed by Davenport, the surviving commissioner, to the proprietors of the town site. This deed recited the sale of the land by the three commissioners, the transfer of the interests of three of the purchasers to Robert Campbell, and the death of two of the commissioners. The entry of acknowledgment of said deed by Davenport in open court recites the death of the two commissioners Johnson and Booth.

William S. Donahoe testified in behalf of defendant that in 1838 or 1839 he laid out and made a plat of the town of Kansas; that he was employed to do so by one of the proprietors of the town site; that there was a public sale of lots in 1838 or 1839; that a number of lots were sold at said sale; that they were sold as laid out on said plat. This plat was found in the recorder's office with the following endorsement thereon: "Filed 3d of May, 1839. Samuel C. Owens, clerk." Owens was recorder at the date of this endorsement. The court refused to permit this endorsement or entry to be given in evidence. The plat was received in evidence.

The plaintiffs moved the court to instruct as follows: "1. If the jury believe from the evidence that plaintiffs, or any of them, and defendant McCoy were tenants in common from May 1, 1846, till August 12, 1853, in the ferry privileges at Kansas city, then they will find the first issue for plaintiffs or such of them as may be tenants in common. 2. To constitute tenants in common, the plaintiffs or some of them must have been joint owners of the said ferry privileges with McCoy. 3. A ferry privilege is an incident to land, and the proprietors of the town of Kansas had the right to reserve the ferry privileges when they laid off and made the plat of said town. 4. By the plat of the town of Kansas, made out and acknowledged by the proprietors Ragan, Gillis, Evans,

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McGee, Jobe and McCoy, and filed in the recorder's office of Jackson county in April, 1846, and the endorsements thereon, the proprietors, or such of them as acknowledged the said plat, reserve to themselves all ferry privileges that attached to said town tract, and the reservation so made is not inconsistent with the dedication of the streets to public uses. 5. If the jury find from the evidence that plaintiffs, or part of them, and McCoy, in April, 1846, made, acknowledged and filed a plat of said town with the reservation so made thereon, then the said plaintiffs, who signed the same, and the said McCoy, are, as between themselves, bound by said plat and reservation, notwithstanding a plat and a sale of a few lots may have been made in 1839. 6. So far as this case is concerned, there is but one legal plat, and that is the one read in evidence, dated in April, 1846. 7. The plaintiffs, who acknowledged the plat of April, 1846, and the said McCoy, are bound by said plat, and they can not go behind it; and before the jury can find for McCoy, they must find that he did not acknowledge the said plat. 8. The legal effect of the reservation of the ferry privileges on the plat of April, 1846, was to retain in the proprietors, to-wit, Ragan, Gillis, Evans, McCoy, McGee and Jobe, the ferry privileges at Kansas as tenants in common. 9. The jury may find that a part of the plaintiffs are tenants in common with McCoy and a part are not; but if they so find, they must name who are tenants and who are not." The court gave all these instructions except the seventh.

Various instructions asked by the defendant were refused. In these the defendant sought to put to the jury the question of a dedication to the public in 1839 of the street used as a ferry landing. In reference to certain questions submitted to the court by the jury, the court instructed as follows: "In response to the first question submitted to the court by the jury, the court instructs the jury that the reservation in the plat and acknowledgment filed in April, 1846, did not confer upon any parties the right to land the ferry-boat on the north side of the Missouri river, but left the

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rights of the parties as to the north side of the river as they were before. In response to the second question submitted to the court by the jury, the court instructs the jury that in assessing the value of the ferry privileges the jury will find what the whole ferry privileges, including the right to land the ferry-boat on both sides of the river, were worth, leaving the court to apportion the same according to their rights, provided the jury find that the plaintiffs or any of them are tenants in common of said ferry privileges with the defendants."

The finding of the jury is as follows: "We, the jury, find that part of the plaintiffs, to-wit, Jacob Ragan, Fry J. McGee, William Gillis, William B. Evans, since deceased, whose heirs are plaintiffs [naming them], were the owners as tenants in common with the defendant John C. McCoy of the ferry privileges of the ferry across the Missouri river at the town of Kansas from the 1st of May, 1846, until the 12th of August, 1853; and so the jury find the first issue for the said plaintiffs Ragan, McGee, Gillis, and the said heirs of Evans, against the said defendant John C. McCoy. And the jury on the second issue find that the yearly value of said privileges was worth seven hundred dollars per year during the said time."

The court made the following finding in addition to that of the jury: "The court finds the following facts not found by the jury and not embraced in the issues submitted to the jury. 1st. The court finds that the plaintiffs Jacob Ragan, Fry J. McGee, and William Gillis, and the defendant John C. McCoy and others, were joint purchasers of the land upon which the town of Kansas was laid out, and that there were in all fourteen original joint purchasers. These facts are averred in the petition, not denied by the answer, and are taken by the court in this finding as true. 2d. The court finds that the defendant John C. McCoy used and kept the ferry and had the same for his benefit and received the entire proceeds of the profits of the ferry privileges of the ferry across the Missouri river, at Kansas city, from the 1st day

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of May, 1846, until the 12th day of August, 1853. These facts are averred in the petition, not denied in the answer, and are taken by the court in this finding to be true. 3d. The court finds that neither the said Jacob Ragan, nor Fry J. McGee, nor William Gillis had any right, title or interest in the land on the north side of the Missouri river, where the ferry-boat landed, but the same was owned during said period between the 1st of March, 1846, and August 12, 1853, solely and exclusively by defendant McCoy. 4. The court finds that neither of the plaintiffs demanded of the defendant John C. McCoy any part of the proceeds of the ferry during the time aforesaid before the bringing of this suit, nor has the defendant John C. McCoy tendered to the said plaintiffs or either of them any part of the proceeds of the said ferry during that time."

The court gave judgment upon both findings in favor of Ragan, McGee and Gillis for one-fourteenth each of one-half of the profits of the ferry at seven hundred dollars per annum from 1846 to 1853, and in favor of Evans' heirs for one cent.

*Hovey*, for plaintiffs in error.

I. The plat of 1846 was not competent evidence. It was not acknowledged by the persons asserted by the petition to be the proprietors. It was not signed. The justice does not certify that the persons were known to him. (R. C. 1845, p. 1056; p. 221, 222, § 15, 16, 20, 21.) The question asked of the witness Smart was proper and should have been answered. (R. C. 1845, p. 55; Ashm. 136.) The first instruction given for plaintiffs is erroneous. Unless the plaintiffs and defendants were all tenants in common, the verdict could not conform to the pleadings. Unless they were all tenants in common, their interests could not be fourteenths. (See 20 Mo. 30.) The third and fourth instructions given were erroneous. (27 Mo. 70.) The latter assumes that an acknowledgment by a part of the proprietors would be a lawful town plat. It assumes that the plat of 1846 was a valid



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town plat and lawfully acknowledged. (8 Mo. 710.) So the fifth instruction. There is no evidence of a lawful acknowledgment, and no signing as mentioned in it. (27 Mo. 26.) The sixth, eighth and ninth instructions were erroneous. (See 4 John. 81; 26 Mo. 394; 26 Mo. 393.) So also the instructions given in response to the questions put by the jury. A parol dedication acquiesced in by the owner and used by the public for six or eight years is a complete dedication. (3 Kent, 433, 450.) The facts in evidence show a dedication in 1839. (6 Pet. 431, 728; 9 B. Monr. 202; 8 Dana, 54; 4 J. J. Marsh. 539; 16 B. Monr. 170, 804; 15 Mo. 635; 8 B. Monr. 232; 3 Mo. 330; 7 Ind. 39.) Tenancy in common can not exist without possession. McCoy's possession was sufficient title as against all persons not showing a superior or equal title. (6 B. & Cr. 703; 4 Burr. 2487; 2 Chitt. Bl. 59, 196.) Mere occupancy of the estate by one tenant in common does not give the action of account to another tenant in common, if the estate is susceptible of being occupied by all. (12 Mass. 150; 17 Pick. 24; Addison, Contr. 373; 17 Q. B. 701.) The action for an account is not maintainable without a demand and refusal to account. (9 Mo. 697; 3 Mo. 315; 16 Mo. 525; 19 Mo. 467; 6 Cow. 475.) There was no finding as to the dedication set up in the answer. There was no order to account and no reference. (R. C. 1845, tit. Account; 1 Wheat Selw. 5; 1 Mo. 514; 21 Mo. 149.)

*Sheley*, for defendants in error.

I. A ferry privilege is an incident to lands. The owner may sell the land and reserve the privilege. (9 S. & R. 32; 8 B. Monr. 256; 2 McLean, 388; 3 Watts, 219; 1 Yates, 167; 20 Wend. 133; 2 Dev. 404; 6 B. & Cress. 703; 3 Term. 142.) The proprietors of Kansas were tenants in common. When they laid out and platted the town in 1846 they remained tenants in common in the reserved ferry privileges. The parties acknowledging the plat of 1846 are estopped to deny it. (8 Dana, 60; 5 Verm. 76; 3 Gill &

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Jo. 29; 16 Mo. 432; 14 Mo. 482; 16 Mo. 273; 2 B. Monr. 429; 5 Cow. 129; 4 Cow. 492; 4 Johns. 230; 3 Mo. 29.) The supposed plat of 1839 was not acknowledged. McCoy's possession was the possession of the company. (3 Dev. 324; 25 Wend. 409; 3 Mo. 529; 3 How. 674; 31 Maine, 34; 22 Verm. 617; 11 Cal. 370.) Although a dedication may have been made in 1839, yet, as the ferry was in existence at that time the ferry privilege was impliedly reserved. (8 Dana, 63.) Although a part of plaintiffs may not be entitled to recover, yet those who are entitled may. (17 Mo. 175; 17 Ark. 660.) The deed of the commissioner Davenport should have been admitted.

SCOTT, Judge, delivered the opinion of the court.

This suit was commenced whilst the practice act of 1849 was in force; consequently it should have been conducted according to the provisions of that act. It was an action for the recovery of money, and therefore under the said act was properly triable by a jury. The prayer for a discovery did not the less make it a case to be tried by a jury. We have held that the act of 1849 abolished the bill for a discovery. (Worley v. Bond, 26 Mo. 253.) The case, then, being one for a jury, the court had no right to share its functions and take upon itself a portion of its duties. In cases to be tried by juries, the jury tries all the issues and the court gives the law. If parties waive a jury trial, and the cause is submitted to the court, then the court without a jury finds the facts and declares the law of them. We are speaking of the act of 1849. In this case, indeed, the court seems to have taken to itself the trial of the facts, and put the finding out of the law upon the jury. Whether the plaintiffs and defendants were tenants in common under the facts of the case was purely a question of law.

We will not undertake to say whether the sale in partition was valid or not on account of the deed having been executed by one commissioner only, the other two having died. It appears that the fact of the death of two of the commission-

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ers was brought to the knowledge of the court before the deed was perfected, and it is strange that the vacancies in the board of commissioners were not supplied. Why has it not been done since and another deed executed; or, if that is now impracticable from deaths and alienations, why not call upon the general assembly to make valid the first deed? This would not make matters any worse, and it might help them.

In a supplementary answer the defendant set up as a defence the first dedication in 1839 of the street which gives rise to this controversy. If there was an actual dedication at that time, the property could not afterwards be resumed by those making the dedication. There is strong evidence of such a dedication; and the proprietors of the town can not take advantage of their violation of the law in not making the dedication in the manner prescribed by the statute. They may have subjected themselves to a penalty, and yet in favor of third persons their act will be binding. (*The City of Hannibal v. Draper*, 15 Mo. 638.) If this suit is again tried, it will be determined whether there was a dedication in 1839.

The plat of April 30, 1846, is not in the record. We can, therefore, give no opinion as to its conformity to law. But we do not see, in the words of the statute, any foundation for the objections that it was not signed by the proprietors, and that the justice did not certify, in the acknowledgment taken, that they were known to him to be the persons they represented themselves to be.

We see no error in the ruling of the court in refusing permission to the witness to testify as to the advantage of the ferry to the town at large. As the plaintiffs claimed a sum of money, which they alleged was due them, we do not see how that circumstance could affect the amount claimed.

The important question in this case is whether, admitting that the plaintiffs and defendants are tenants in common of the ferry privilege, or street, or space of ground where the ferry was kept, the plaintiffs can maintain this action? It is

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said that if one tenant in common occupies the whole estate, without any claim on the part of his co-tenants to be admitted into the possession, and without hindrance by him of such possession, he is not liable to his co-tenants in an action of account. (Coke Litt. 200, *b.*; Bacon's Abrid. tit. "Joint Tenants," letter L.; Sargent v. Parsons, 12 Mass. 149; Woolever v. Knapp, 18 Barb. 266.) The modern English authorities are to the same effect. (Henderson v. Easom, 9 Eng. Law & Eq. 337.) Our statute giving an action of account to joint tenants and tenants in common against each other is similar to the statute of New York and the statute of 4 Anne. The tenant is only liable as bailiff or receiver, and this relation can only arise by contract. Each tenant is entitled to the possession, and may enter and enjoy if he will. As each tenant is entitled to his share of every part of the undivided premises, one tenant can not gain an exclusive right to any part of them. He may enter and enjoy a portion less than his share, yet the other tenants will be entitled to their share of that portion, as each tenant is seized of his portion of every part of the undivided premises; so that if the law were otherwise, one tenant might refuse to enter, and the other could not enjoy any portion, even one less than his share, without making himself liable to the others for a share of the profits, and that without regard to the fact whether the occupation was beneficial or otherwise to the premises. Of course, if one co-tenant ousts another, he will be liable in an ejectment, or subject himself to the law of forcible entries. But where the land is free to all, and each may enter if he will and enjoy his rights undisturbed, there is no reason in compelling him, who does enter, to pay rent to him who neglects or obstinately refuses to do so.

But how much stronger is the case before us than the one put? Here are tenants in common of a parcel of land on which a ferry may be kept. One of them obtains a license and actually keeps a ferry, an employment that nowise lessens the value of the common property, but on the contrary heightens it. Each of the tenants may do the same thing.

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They neglect it, however, and yet would enjoy the profits of him who does. Licenses to keep ferries continue for one year. It does not appear that the license granted the defendant has obstructed the enjoyment of the right of the others, or but that redress might have been had if application had been made to the proper tribunal. The right to keep a ferry is a personal privilege sold to the person obtaining the license, and is not transferable. (*Stark v. Milber and others*, 3 Mo. 350.) Suppose two were tenants in common of a private stream, which afforded as many fish as both could take, and one of them made the taking of fish his business, from which he reaped a profit, would the other be permitted to share that profit? It may be that the expenses would be diminished, and thereby their profits increased by uniting in the employment; but if they will not do this, and one is at all the expense, why should they share the profits, when the employment has not at all affected the value of the common property?

As the plat of 1846 is not before us, we will hazard no opinion as to the effect of it between the proprietors.

As we suppose this suit was brought to try the right of the parties to the ferry privilege, the cause will be remanded so that the parties may amend their petition in a way that their action may be adapted to that end.

The mode of trying the cause, and the error in the instruction in relation to the dedication in 1839, are sufficient to reverse the judgment.

Reversed and remanded. The other judges concur.



DUNCAN, Defendant in Error, v. MATNEY, Plaintiff in Error.

1. In order that the defendant in an execution may recover damages against a sheriff for an irregularly conducted sale of property by such sheriff, he must show some loss or damage resulting to himself as a natural and legal consequence of the irregularities and improprieties complained of; he can not fix the measure of his own damages by his voluntary act in paying

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- money to recover back from the execution purchaser the property alleged to have been irregularly sold.
2. To constitute a valid levy of an execution on real estate, it is not necessary that notice of the levy should be given by the sheriff to the defendant in the execution; nor is it necessary that he should go on the land to make the levy, if he is sufficiently informed in relation to it to describe it properly.
  3. A sheriff succeeding to office upon the resignation of his predecessor must proceed to do all things remaining to be done and performed in relation to the execution of process commenced and partly executed by his predecessor, or by the coroner, provided such acts in part execution are legal and regular.
  4. It will not invalidate a levy in real estate that the name of the county in which the land is situated is not stated in the advertisement of sale.
  5. The law is silent as to what shall constitute the evidence of a levy; it will be sufficiently regular if the memorandum of the levy be made upon a separate piece of paper and copied upon the writ of execution before its return; the officer may use his advertisement as evidence of the levy in making his return to the writ.
  6. When an instrument, of whatever solemnity, is offered merely as containing an admission against the party executing it, it is competent for him to explain it.

*Error to Buchanan Circuit Court.*

This was an action to recover damages for the sale of plaintiff's land by the defendant, as sheriff of Buchanan county, by virtue of an execution. Plaintiff alleged in his petition that about the 14th day of December, 1857, defendant was sheriff of Buchanan county; that a certain judgment had previously been rendered against plaintiff; that an execution issued on said judgment and "was placed in the hands of the sheriff of Buchanan county for collection;" that about said 14th of December, 1857, defendant, under said execution, sold all the right, title and interest of plaintiff in and to west half of the south-west quarter of section twenty-six, in township fifty-six, of range thirty-five; "that no legal levy had ever been made on said land so sold by defendant or any one else; that defendant never advertised said land for sale, but sold without advertising the same for sale in due form of law;" that plaintiff was never notified by defendant or any one else of said execution so that he could make his selection as provided by statute; that plain



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tiff had always a sufficiency of personal property not exempt from execution. "Plaintiff further states that for the purpose of getting back said property so sold he had to pay out and expend and otherwise incur liability to the amount of two hundred dollars. Plaintiff further states that by reason of said illegal levy, proceedings and sale of said land by said defendant, he has been damaged in the sum of two hundred dollars, and for which he prays judgment."

At the trial the plaintiff adduced the following facts in evidence. He introduced S. N. Sheridan as a witness, who testified that he was sheriff of Buchanan county about the 4th of November, 1857, when the execution referred to in the petition came into his hands as sheriff. The execution was dated November 4, 1857. He testified that he never notified Duncan that said writ was in his hands; that when he resigned his office of sheriff he handed over all the papers in his hands as sheriff, including this execution, to W. R. Penich, the coroner. Penich, the coroner, testified that the writ came into his hands to be served about 23, 4, 5, 6 or 7th of November, 1857; that with it was the copy of an advertisement for the sale of land; that from this copy he endorsed on said execution a levy of said writ, and handed in the copy of the advertisement to the Journal office to be published in the St. Joseph Weekly Journal, a paper published in St. Joseph, Buchanan county; that he endorsed said levy on said writ without leaving the city of St. Joseph and without notifying the plaintiff thereof; that he handed over the writ of execution to Matney, the defendant in this suit. The execution with the endorsement thereon was introduced in evidence. The endorsement was as follows: "I levied the within execution on the following described real estate—*eighty acres of land, west half of south-west quarter of section twenty, township fifty-six, range thirty-five*—also *eighty acres of land, west half of north-west quarter of section twenty-six, township fifty-six, range thirty-five*—also *one hundred and twenty acres of land, east half and south-west south-west quarter of section twenty-three, township fifty-six,*

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range thirty-five. Done in Buchanan county, in Missouri, November 26, 1857. Advertised for sale in Journal, December 19, 1857. W. R. Penich, coroner." "I return the within execution satisfied in full. December 19, 1857. James H. Matney, sheriff."

The plaintiff also introduced in evidence the deed of the sheriff Matney. This deed recites the judgment, the issuing of the execution "directed to the sheriff of said county, and to me, the said sheriff, delivered, by virtue of which said writ or execution I, as sheriff aforesaid, did on the 26th of November, 1857, levy upon and seize all the right, title and interest, claim, estate and property" of the said Duncan in and to the following described real estate, to-wit: *Eighty acres of land, west half of south-west quarter of section twenty-six, township fifty-six, range thirty-five*—also the west half of the north-west quarter of section twenty-six, township fifty-six, range thirty-five—also one hundred and twenty acres, east half and south-west quarter section twenty-three, township fifty-six, range thirty-five." The deed then recites that previously to the day of sale he gave more than twenty days' notice of the time and place of sale by causing a full description of said property to be advertised in the *St. Joseph Weekly Gazette*; that he did on the 19th of December, 1857, sell a portion of said real estate, to-wit, the *west half of the south-west quarter of section twenty-six, township fifty-six, range thirty-five*. He then proceeds to convey said tract to the purchasers.

The defendant having duly proven advertisement of sale published in the *St. Joseph Weekly Journal*, offered the same in evidence. The court ruled it out on objection of plaintiff. It was as follows: "Sheriff's sale. By virtue of an execution to me directed issued from the clerk's office of the Buchanan court of common pleas, in favor of Benjamin F. Loan, and against Bartly M. Duncan and Augustus Mark, I will, on the 19th day of December, 1857, sell to the highest bidder, for cash in hand, at the court-house, in the city of St. Joseph, Buchanan county, Missouri, between the hours of

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nine o'clock A. M. and five o'clock P. M. of said day, and whilst the said court is in session, all the right, title, interest and claim of the said Bartly M. Duncan of, in and to the following described real estate, viz: *Eighty acres of land, west half of south-west quarter of section twenty-six, township fifty-six, range thirty-five*—also eighty acres of land, west half of north-west quarter of section twenty-six, township fifty-six, range thirty-five—eighty acres of land, south half of north-west quarter of section twenty-three, township fifty-six, range thirty-five—also one hundred and twenty acres of land, east half south-west south-west quarter of section twenty-three, township fifty-six, range thirty-five, to satisfy said execution. [Signed] W. R. Penich, coroner. November 27.”

The court, at the instance of the plaintiff, gave the following instructions to the jury: “1. There is no evidence before the jury that said land sold was ever advertised for sale; and no sale of land by a sheriff is a legal sale on his part without advertisement. 2. If the jury believe from the evidence that defendant sold said land of plaintiff without first having advertised the same, either himself or some one other to advertise for sale the said lands, they will find for plaintiff, and assess his damages at such sum as he has sustained thereby. 3. Defendant admits that he never advertised said land for sale.”

The court gave the following instructions asked by defendant: “1. Unless the plaintiff had some title to the land mentioned in the petition the jury will find for the defendant. 2. This defendant is not liable in this action for any omission on the part of Sheridan or Penich, whilst they had the execution given in evidence in their hands as officers, failing to perform acts required by law and said writ to be performed by them as such officers. 3. The levy endorsed on said execution is evidence that said land was seized by the officer to satisfy said execution. 4. Unless the jury believe from the evidence that the plaintiff has sustained some damage by the sale of said land, this defendant will find for him. 5. Un-

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less the jury believe from the evidence that the land mentioned in the petition was not levied upon by virtue of said execution by an officer authorized to levy the same, or was sold by defendant without having been first advertised for sale for twenty days prior to the time fixed for such sale, or by full publication in a newspaper printed in said county, the jury will find for the defendant." The court refused the following instruction asked by defendant: "6. The recitals in the sheriff's deed read in evidence are *prima facie* evidence of the matters contained in such recitals."

The jury found for plaintiff.

*Loan*, for plaintiff in error.

1. The court erred in excluding the notice of sale offered on part of defendant. The instructions given for plaintiff were erroneous and calculated to mislead. The motions for a new trial and in arrest should have been sustained.

*Vories & Vories*, for defendant in error.

I. The advertisement was properly excluded. The land advertised and sold by the sheriff's deed had never been levied on. The return on the execution shows the tract levied on to have been the west half of the south-west quarter of section twenty, township fifty-six, range thirty-five. The land sold was in section twenty-six. Neither the levy nor the advertisement states in what county the land was situated. (R. C. 1855, p. 746, § 45.) There was a variance between the advertisement and the deed with respect to the paper in which the advertisement was made.

II. The court committed no error in giving the first and third instructions. The land was not advertised as the law directs. The advertisement shows land upon which no levy had been made. The court committed no error in refusing the sixth instruction.

SCOTT, Judge, delivered the opinion of the court.

This is one of those suits, becoming so common under our present practice act, from which it is impossible to ascertain

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what legal idea was in the mind of the attorney at the time he wrote the petition. It is alleged that the plaintiff, "for the purpose of getting back the property illegally sold, had to pay out and expend and otherwise incur liability to the amount of two hundred dollars." The petition then concludes with the averment that, by reason of said illegal levy, proceedings and sale of said land, the plaintiff has been damaged in the sum of two hundred dollars, for which he prays judgment. We infer from this that the plaintiff claims as damages, and as the measure of the loss he has sustained, the two hundred dollars he paid to obtain the restoration of the property sold. It is admitted then that the sale passed title. If that was the case, then the irregularity of the sale did not make it invalid. If the plaintiff then sustained an injury, it must have been by reason of the irregularities of which complaint is made. Now how does he make it appear that the payment by him of two hundred dollars was a natural and legal consequence of the irregularities? If any irregularity had been committed by the officer in conducting the sale, and that irregularity, being known to the bystanders, had damped the ardor of bidders or in any manner caused a diminution of the sum that would otherwise have been realized from the sale, the plaintiff would be entitled to recover the damages he could show he had sustained by reason of the misconduct of the officer; but he does not allege that the property was sacrificed, or that the sale was injuriously affected by the matters of which he complains. That he gave two hundred dollars to regain his property is no evidence of the extent of the loss he sustained, or that payment was no legal and natural consequence of the misconduct of the officer. Such payment may have been prompted by motives with which the sheriff had nothing to do and which ought not to have affected him. Had his malice prompted the plaintiff to pay ten thousand dollars for the restoration of his property, could he have expected to recover that sum? He had no right to fix the measure of his damages by a voluntary payment.

We will now examine the breaches of duty of which the plaintiff complains the officer was guilty. One of them is, that no levy was made. Our statute regulating executions declares that the word "levy" shall be construed to mean the actual seizure of the property by the officer charged with the execution of the writ. (Section 74.) This, of course, only applies to property capable of being seized. The act regulating fees directs that when an execution is served on real estate, the officer shall be bound to go on the land or sufficiently near it if necessary in order to describe it properly. (Section 13.) Now it will be seen that the law is silent as to any notice to the defendant in the execution being requisite to constitute a valid levy, and also as to the manner in which a levy shall be evidenced. There is nothing in the case which shows that it was necessary to go on land to make a levy, which is not required if the officer is otherwise sufficiently informed in relation to the property to describe it properly.

The twenty-fifth and thirty-fourth sections of the act regulating executions giving the defendants the right to elect on what property executions shall be levied, and the order in which the property shall be offered for sale, are silent as to notice by the sheriff to those defendants. This is a subject for legislation, and the courts can not, without assuming duties which do not properly belong to them, make rules in relation to it. A good officer, when it is practicable, will always inform a party of an execution he may have against him, if he believes he is not aware of it, and will confer with him before he makes a levy. But the defendant may be out of the way; he may be out of the county; or, knowing the shortness of time in which a levy and advertisement must be made, he may keep out of the reach of the officer, and thus prevent a levy in time to make a sale before the return day of the process. In this way many abuses would creep in, which would be beyond any power of correction the courts possess. The law seems to have left to defendants, against whom executions have been issued, the duty of taking notice



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of the fact. It is generally known to defendants, and laws are adapted to the cases which most frequently occur. In the event of abuse by the officer, or of collusion with the plaintiff or others, the courts can give redress by virtue of the control they possess over the execution of their process.

It is singular that, under the circumstances, the court should have instructed the jury that the defendant admitted that he did not advertise the land. The defendant, in making the sale, acted as the successor in office to another. He had been in office but a few days before the sale. In order to make a sale at the return term of the court it was necessary to adopt the levy and advertisement of his predecessor and carry on the execution of the process begun by the officer whom he succeeded, and it is stated expressly in the answer that the land was advertised by the officer whom he replaced, and yet the court instructs the jury that he admitted that he did not advertise the land, and gives no explanation of the object of the instruction. Now what was the purpose of such an instruction? Was it to declare that the successor in the sheriff's office could not adopt the act of his predecessor in part execution of process? Was he not bound to do it? Could he subject the defendant to the cost of another levy and advertisement, without incurring a liability to an action? It is not maintained that the successor must adopt the acts of his predecessor if he is satisfied that they are illegal and irregular.

The plaintiff does not show that he sustained any damage by reason of the omission in the advertisement of the name of the county in which the lands were situated. It is generally known that the sheriff of one county can not, under an execution, sell lands lying in another; nor is it shown how he was damaged by the mistake he made in copying the description of the land levied on. The evidence shows that the land advertised was the land sold, and it is hard to see how a mistake in copying a levy from another paper on the back of the execution could prejudice the plaintiff. If the levy was properly made, a mistake afterwards committed in copy-

ing it could not affect the legality of the sale. We have already said that the law is silent as to what shall be the evidence of a levy; but if a levy is made, and a memorandum made of it on a separate piece of paper, and that memorandum before the return of the writ is copied on it, we see no objection to the regularity of such a course, nor to the officers using his advertisement as evidence of a levy in making his return to the writ. The plaintiff's own witness explains this whole matter.

The court erred in rejecting as evidence the advertisement of the sale. If it be said that it was inadmissible because it contradicted the defendant's deed, it may be answered that although a deed can not be contradicted when used as evidence of the agreement and understanding of the parties to it, yet this deed was offered in evidence by the plaintiff merely as an admission of the defendant, and the rule is, that when an instrument, of whatever solemnity it may be, is offered merely as an admission made by the party executing it, it is always competent to him to explain it, and to show that he was under a mistake in making it, or to prove any other circumstances which will do away with the effect of the admission.

Reversed and remanded. The other judges concur.

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KEENE, Plaintiff in Error, v. BARNES, Defendant in Error.

1. Under the act of Congress of March 2, 1821, (3 U. S. Statutes at Large, p. 612,) purchasers of the public lands who had not paid the whole purchase money might relinquish their purchases and others might be substituted in their places and might complete the purchases.
2. A sale, by the marshal of the United States, at the court-house in St. Louis, under a judgment of the United States district court, of lands situate in Boone county, is, it seems, valid.
3. A sheriff acting under the act of the general assembly of February 27, 1843, (Sess. Acts, 1843, p. 137,) sold thirteen several tracts assessed in the names of different persons for the taxes of the year 1842. They were sold in the lump and for the aggregate taxes of that year, the taxes due on each tract separately not being stated. *Held*, that the sale and the deed made in pursuance thereof were void.

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4. A county collector making sale of land for taxes under the act of February 13, 1847, (Sess. Acts, 1847, p. 119, § 10,) was bound to make his sales before the door of the court-house of the county ; so also he was required to set up at the court-house door a copy of the advertisement by the register of lands of all the unredeemed lands of the state for sale, also to set up at the most public places in the county the twenty slips received from the register setting forth the lands and lots advertised in each county. If these requisites were not complied with, the sale by the collector would be invalid.
5. Where an action of ejectment is brought against several, and it appears that their possession is not joint, but several and adverse, of separate portions of the tract claimed, the plaintiff may be required to elect against which of the defendants he will proceed to take judgment.

*Error to Boone Circuit Court.*

This was an action in the nature of an action of ejectment against Tarlton Barnes, Philip Barnes and Samuel Ashlock, to recover possession of the south-west quarter of section fifteen, township forty-seven, range eleven. The defendants denied joint possession, and asserted several and adverse occupancy. The plaintiff, in support of his title, introduced transcripts of entries at the land office. These entries showed that one Burckhart had first entered the quarter section in controversy in 1818 and had paid part of the purchase money. Plaintiff also introduced a final certificate of entry issued in 1821, to Angus L. Langham. No conveyance by Burckhart to Langham was shown. Plaintiff then introduced a certified copy of a judgment rendered in the year 1823 in the district court of the United States for Missouri, against said Langham. An execution issued upon this judgment and under it the marshal of the United States levied upon the land in controversy, together with many other tracts situate in different counties of the state. The marshal made his sale under this levy at the door of the court house of St. Louis county. Jesse G. Lindell became the purchaser of the tract in controversy at this sale and received the marshal's deed therefor, dated March 12, 1825. Lindell, in the year 1855, conveyed the same to plaintiff. It also appeared that Philip Barnes, one of the defendants, was in the separate and exclusive possession of twenty acres of the land in con-

troversy ; that Ashlock was in possession of twenty-five acres ; that Tarlton Barnes was in possession of the residue ; that the defendants made no joint entry. The court here compelled the plaintiff, on motion of defendants, to elect which of the defendants he would proceed against. He elected to proceed against Tarlton Barnes and the suit was dismissed as to the others.

The defendant introduced, against the objection of plaintiff, a deed dated March 30, 1855, executed by the register of lands of the state of Missouri. By this deed a portion, one hundred and forty acres, of the land in suit was conveyed to John H. Hickam. This deed was based upon a sale by Douglass, the sheriff of Boone county, for the taxes of said land for the year 1851. Hickam conveyed the land by deed dated September 5, 1857, to the defendant Tarlton Barnes. The defendant also introduced, against the objection of plaintiff, a deed, dated September 3, 1844, from F. A. Hamilton, then sheriff of Boone county. By this deed the land in suit, together with twelve other tracts, were conveyed to one F. T. Russell. The sheriff made this deed in pursuance of a sale by him of said tracts for the taxes of the year 1842. The tracts, as appeared from the deed, were assessed to different persons ; they were sold in the lump, and for an aggregate amount of taxes, the amount of taxes due upon each separate tract not appearing.

The plaintiff, in rebuttal, after reading extracts from the advertisements sent out by the register of lands, showing the manner in which the land in controversy was described, and extracts from the assessor's books, introduced Joseph B. Douglass, former sheriff of Boone county, as a witness. He testified that he did not himself give notice of the sale of lands for the nonpayment of the taxes of the year 1851 by setting up twenty slips of advertisements at the most public places in the different townships in Boone county ; that he supposed this was done by his deputies ; that he was in the habit of sending out the twenty slips required to be set up in the different townships by his deputies, and by other persons ;

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that he set up one of said slips on a column at the court-house; that he did not put up at the court-house one of the four general advertisements sent him by the register containing a list of all the lands advertised for sale in the state for the nonpayment of taxes for the year aforesaid; that he kept said general list in his office subject to the inspection of any one who desired to look at it; that in the sales of lands made by him for the nonpayment of taxes he did not sell them before the court-house door, but in his office; that he recollects the sale of the land in controversy; that he sold said land in his office whilst sitting at his table; that it was bought by John Hickam for the sum of two dollars and fifteen cents, he being the best bidder; that he was in the habit of continuing the sales of land from day to day until all were sold; that the lands were not sold regularly, one tract after another, but that any one coming into his office and naming a tract advertised for sale that he desired to purchase, the same was immediately put up and sold to him who would take the smallest portion thereof and pay the taxes, penalties and costs thereon; that whilst he was sheriff of Boone county he kept the office of sheriff in a room in the court-house, at the front end of the building; that the door of the office opened into a hall eight or ten feet distant from the court-house door; that he could not say whether when he sold the land in controversy the door of the office was shut or open; that he was not in the habit of making public proclamation of the sale of land for taxes, nor did he do so at the time the tract in controversy was sold; that from time to time, when sales of lands were about to take place, he would cause the court-house bell to be rung.

The plaintiff moved the court to declare the law as follows: "1. The register's deed to Hickam, not having his private seal attached thereto, passed no title to Hickam. 2. In order to constitute a valid sale of the land in controversy the law regulating the sale of land for taxes must have been strictly complied with, and if there was an omission of any of the prerequisites to authorize a deed to be made, then



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said sale is void and passes no title to the purchaser. 3. The land in controversy not having been properly described by its assessment for the year —, as required by law, the sale made of said land for the nonpayment of the taxes for said year is invalid and void. 4. If the land in controversy was not legally described in the list required to be certified to the register of lands, or in the advertisement thereof by the register of lands, or in the deed of conveyance under which said defendant claims, by its township, range, section, fractional part of section, or other legal subdivision thereof, then they will find for the plaintiff as to the one hundred and fifteen acres claimed by the defendant Tarlton Barnes. 5. If the collector failed to set up twenty slips, setting forth the lands and town lots advertised for sale in his county and forwarded to him by the register, at the most public places in the several municipal townships of the county, then they will find for the plaintiff as to the one hundred and fifteen acres claimed by defendant Tarlton Barnes. 6. If the collector failed to put up at the court-house door a copy of the general advertisement of all the lands advertised for sale for nonpayment of taxes transmitted to him by the register, then the sale of the land in controversy by the collector was invalid and passed no title to the purchaser. 7. Unless the land in controversy was sold by the collector publicly before the court-house door as required by law, his deed is void and passes no title to the purchaser. 8. The deed from the sheriff Hamilton to Russell showing upon its face that all the lands conveyed therein were sold in a lump and in not otherwise complying with the requirements of the law, the same was void, and passed no title to the purchaser." Of these the court gave those numbered two, five and seven, and refused the others.

The defendant moved the court to declare the law as follows: "1. It devolves on the plaintiff to prove title in himself to the land in controversy. 2. The land in controversy having been originally entered by Burekhart, it devolved on the plaintiff to prove a regular chain of title from said Burek-



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hart by deeds of conveyance, and no deed having been shown from Burckhart, the plaintiff is not entitled to recover. 3. The marshal's sale and deed to Lindell did not pass the title to the land in controversy to said Lindell. 4. The register's deed to Hickam is *prima facie* evidence of title in fee simple in said Hickam to the land in controversy, and the defendant's deed from Hickam for said land vested Hickam's title in the defendant. 5. If the court finds that the defendant was in possession of the land, claiming title under a deed from Hickam, then the defendant had a right to protect himself by an outstanding title, and for this purpose the sheriff's deed to Russell is *prima facie* evidence of title in fee in said Russell as against said plaintiff." Of these the court gave those numbered one, four and five, and refused those numbered two and three.

The court found for the defendant.

*Guitar, Gordon & Rollins*, for plaintiff in error.

I. The rule prescribed by our statute making the register's deed *prima facie* evidence of title in fee simple in a purchaser at a tax sale, and devolving the onus of proof upon the parties claiming adversely to such deed, is a wide departure from the well settled principles of the common law, and in direct opposition to the rule requiring "that all essential links in every chain of title, whether they are evidenced by records or deeds, or rest merely in parol, must be affirmatively proved by the party who sets up the title." No title passed by the sale and conveyance to Hickam. The twenty slips, required by the statute, of the advertisement under which the land was sold, were not set up by the collector. (See Sess. Acts, 1847, p. 118, § 5.) Douglass' evidence is ample to negative the fact that the twenty slips were set up. Plenary evidence is not required in proving a negative averment. (Blackwell on Tax Titles, 603.) The collector did not set up at the court-house door as required by the statute one of the four general advertisements comprising all the delinquent lands for the year 1851. (Sess. Acts, 1847, p.

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118, § 5.) The land in question was not publicly exposed to sale by the collector before the court-house door, but was sold privately at his table in his office. (Sess. Acts, 1847, p. 119, § 10 ; Blackwell on Tax Titles, 312, 322.) The description of the land contained in the advertisement, as also in the deed to Hickam, is vague and uncertain. It is insufficient to enable a surveyor to locate it, to authorize the sale or pass the title under it. (Blackwell on Tax Titles, 267, 268.) The court erred in permitting the deed from the sheriff Hamilton to Russell to be read in evidence. No title passed under that deed. The act of 1843, under which this sale was made, required that only " so much of each tract of land or town lot should be sold as would pay the taxes, interest and costs due upon the same. (Sess. Acts, 1843, p. 138, § 2.) This question is fully settled in the case of the State v. Richardson, 21 Mo. 420.) The sale in that case was made under the act of 1847. The court erred in refusing to give instructions numbered one, three, four, six and eight, asked for by the plaintiff, for the reasons already stated. The marshal's sale under which Lindell purchased was valid and passed the title to Lindell. (Kennerly et al. v. Shepley, 15 Mo. 640.)

*J. M. Gordon*, for defendant in error.

I. It devolved on the plaintiff to prove title in himself to the land in controversy. The land having been originally entered by Burckhart, it devolved on the defendant to prove a regular chain of title from said Burckhart by deed of conveyance to entitle him to recover the land. The sale of the land by the marshal to Lindell passed no title to the land. The sale was made in St. Louis and the land is situated in Boone county, and was not properly described in the notice of sale. The register's deed to Hickam is *prima facie* evidence of title in fee simple in Hickam to the land, and Hickam's deed to the defendant Tarlton Barnes vested Hickam's title in the defendant. The defendant Tarlton Barnes was in possession of the land, claimed title thereto under a deed

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from Hickam, and had the right to protect himself by an outstanding title; and for this purpose the deed from Hamilton to Russell is *prima facie* evidence of title in fee in Russell against the plaintiff. The deed from Hamilton to Russell is a valid deed and passed the title to the land to Russell. There is nothing in this deed showing that the several tracts of land embraced in the deed were sold in a lump, and the court can not say that the several tracts mentioned in the deed were sold in a lump, from any thing which appears in this cause. There was no joint entry or joint possession by the defendant of any part of the land. The court, therefore, properly required the plaintiff to elect as to which of the defendants he would proceed against and to dismiss his suit as to the other two defendants.

SCOTT, Judge, delivered the opinion of the court.

There was no specific objections made to the instruments by which the plaintiff's title was shown. Objections to legal instruments as evidence must be specific and made in the court below, as they can not be noticed here for the first time. The act of March 2, 1821, authorized the purchasers of public lands to relinquish their purchases, and although Christopher Burckhart was the original purchaser of the tract in controversy, yet the record shows that Angus L. Langham received the final certificate of entry as the assignee of Burckhart. The plaintiff claims through Langham, and there was no specific objection to the deed of the United States marshal conveying Langham's interest to Lindell, from whom the plaintiff claimed. We see no objections to the proceedings of the marshal, and it is not our business to see them unless they are first pointed out and determined in the inferior court. Sales conducted in the manner of that now under consideration have received the sanction of this court. (Kennerly v. Shepley, 15 Mo. 640.)

As one of his defences, the defendant relied on a sheriff's deed for taxes as an outstanding title. This deed was made on the 3d day of September, 1844, to Francis T. Russell for

the taxes due on the land for the year 1842. It appears that the deed contained thirteen tracts or parcels of land, which were assessed in the names of different persons; and it did not appear but they were owned by different individuals. The aggregate amount of the taxes due on all the tracts is only stated. It is obvious that this deed can not be sustained. If even all the lands belonged to one person, such a sale would be oppressive. The owner might be willing to redeem a portion of the tracts, which he could not do; as the transaction stood as a single sale, the owner would be obliged to redeem all or none. How much would the confusion of the transaction be aggravated, if the lands were owned by different persons? We do not hold that a purchaser must take a separate deed for each tract purchased by him at a sale, but he must take a deed so worded as not to embarrass the owner's right of redemption or clog it with conditions not imposed by law.

The defendant also claimed under a register's deed dated 30th of March, 1855, on a sale made by the collector of Boone county, on the first Monday of October, 1852, for the taxes of the year 1851 due on the said land. John Hickam became the purchaser at the sale, and conveyed to the defendant. Some of the objections to this deed are founded on extrinsic evidence. Can not the parties see how this court is embarrassed in revising cases like this, when they have been tried without a jury? A party produces evidence in support of a certain hypothesis; the evidence is received, and instructions are based upon it favorable to the party offering it; and notwithstanding they are given, a verdict is found against him. Under these circumstances it is impossible for this court to ascertain the ground of the action of the inferior court. If the plaintiff would waive his jury trial, why did he not set forth the circumstances in which an instruction under which the collector made the sale and call upon the court to declare whether a sale in his office was a compliance with the law? As the case now stands, the instruction, to the effect that the sale must be before the court-

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house door, is undoubtedly correct, for it is a statutory requirement; but how does it throw any light on the case, and how are we embarrassed in reviewing the instructions of this case if we can believe that the court placed any confidence in the truth of the collector's statement? If the printed advertisement of the list of all the taxable lands in the state was not put up as the act of 1847 required, how can the sale be supported? So of the twenty slips required by law to be put up. The evidence, however, in regard to these may not have been sufficient to satisfy the mind that they were not put up.

As to the description of the land, we do not feel willing to give any opinion as to its sufficiency. It does not appear how the tract was reduced to one hundred and forty acres. If the plaintiff had no more than was sold, or more than was sold, let the fact appear. All the facts in relation to this matter should be set forth so as to form an opinion upon it.

As to the compelling of the plaintiff to elect against which of the defendants he would proceed, it will be observed that the defendants set up in their answer the defence that they held portions of the premises in severalty, and denied the joint occupancy. If so, they could not be jointly sued. But the facts of the answer must be proved; and when they were found true, then the question would arise against which of the defendants the plaintiff would take judgment. (Jackson v. Hagen, 2 Johns. 441; Fosgate v. The Herkimer Manufacturing Co. 2 Kernan, 580; Vorhies N. Y. Prac. 598.)

Judgment reversed and remanded; the other judges concurring.

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DOW'S EXECUTOR, Plaintiff in Error, v. SPENNY'S EXECUTOR  
*et al.*, Defendants in Error.

1. In the execution of a promissory note a person may adopt and ratify the signing of his name by another.
2. In a suit on a promissory note in which the defendant sets up as a defence

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that his name was forged by one of the joint makers, the defendant can not show, in support of his defence, that the alleged forger was a fine penman and had great skill in imitating the handwriting of others, so as to deceive even the person whose name he forged; nor can it be shown that such person had committed other forgeries.

3. Nor would it be competent for the plaintiff in such case to introduce in evidence papers known to be in the handwriting of the defendant in order that the jury might compare the signature upon the paper with that upon the note sued on.

*Error to Cooper Circuit Court.*

*Douglass & Hayden*, for plaintiff in error.

I. The court erred in refusing the instructions asked by plaintiff. The liability of the defendant is placed in these instructions upon two grounds: 1st, ratification or adoption of the act of Norris in signing his name to the note; 2d, fraud committed by Spenny in inducing the plaintiff to believe that his signature was genuine, whereby she was misled to her prejudice. There was evidence showing a ratification or adoption. (See 1 Am. Lea. Cas. 572-4; 7 Humph. 224; Story on Ag. § 160, 253-7; 17 Mass. 1, 33; 4 Esp. 226; Greenl. Ev. § 196.) Spenny misled plaintiff to her prejudice. (25 Mo. 386; 24 Mo. 223; 22 Mo. 85; 1 Smith L. C. 177; 1 Sto. Eq. § 384-7.) He is estopped to deny the genuineness of his signature, or to set up the defence of forgery. (See 2 Smith L. C. 531; Sto. Eq. 385; 1 Greenl. Ev. § 27, 207; 19 Mo. 204.) The question of fraud and ratification ought to have been submitted to the jury. The instructions given to the jury misled them. The statute of frauds has nothing to do with the case. (14 Mo. 482; 16 Mo. 273.) The court committed error in permitting defendants to introduce as evidence the fact that Norris was "a skillful penman; that he could imitate almost exactly the signatures of others, and was capable of committing forgery so well that the person whose name was forged would be deceived by it." Also in refusing to permit plaintiff to show that the signatures of Brent and Keyser, sureties on said note, were genuine. Also in refusing to permit plaintiff to



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exhibit to the jury the paper with the genuine signature of defendant Cope. (1 Greenl. Ev. § 581; 14 Mo. 166.)

*Adams, Stephens & Vest*, for defendants in error.

I. The refused instructions asked by the plaintiff were based upon the erroneous assumption of an estoppel *in pais*, when there was nothing in the case to warrant such a conclusion. To constitute such an estoppel, there must be, first, an admission inconsistent with the evidence proposed to be given on the claim offered to be set up; second, an action by the other party upon such admission; third, an injury to him by allowing such admission to be disproved. (See *Dorrell v. Odell*, 3 Hill, 219; *Taylor & Mason v. Zepp*, 14 Mo. 488; *Pickard v. Sears*, 6 Ad. & El. 469; *Hearn v. Rogers*, 9 Barn. & Cress. 577; *Meriwether v. Lewis*, 9 B. Monr. 177.) The note sued upon was the note of Norris alone, and the plaintiff must look to him for payment. There is no evidence that he is not able to pay it, and if there was, it could not be used to the prejudice of these defendants. As the names of Spenny and Cope are forgeries, this note, as to them, is a mere blank piece of paper; and being the note of Norris, any promise by the defendants or either of them to pay Norris' note was within the statute of frauds, and therefore the instructions for the defendants were properly given. (*Jones v. Walker*, 13 B. Monr. 360; 3 Metc. 396.) The question before the jury was whether the names of Spenny and Cope were forgeries, and evidence was given tending to show that they were forgeries committed by Norris himself with such skill and so similar to the genuine signatures as to require the strictest scrutiny to detect them, and in this connection the evidence of Norris' skill in such matters was offered, and it was surely competent and the very best evidence that could be given. The paper containing Cope's signature, offered to the jury as a comparison, was properly excluded. A party has no right to make his own selections of handwriting for comparison; and in fact no writing can be exhibited for this purpose except such

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as form a part of the case and are properly before the jury as original evidence. To allow a party to make his own selections would be unjust, as unfair specimens would always be selected. (1 Greenl. Ev. 649, and cases cited; 7 B. Monr. 270.)

SCOTT, Judge, delivered the opinion of the court.

This is a suit on a promissory note, and it is alleged that the defendant Cope and Weedon Spenny, the testator of the defendant, by their promissory note promised to pay the plaintiff the sum stated in the note. Stephens denies that his testator executed the note sued upon, and that it is or was his act. Cope denied that the note was his or that the plaintiff is entitled to judgment against him. A witness, who had seen Spenny and Cope write, was of the opinion that their signatures to the note was genuine. There was other testimony to the same effect. The note sued on was signed first by W. W. Norris, and after his name follow the names of others and of Cope and Spenny. Norris was a son-in-law of Spenny, and absconded some twelve months after the date of the note, which was payable twelve months after date, which was the 25th of October, 1856. The note was presented to Spenny by an agent of the plaintiff to know if his signature was genuine. Spenny remarked, after having examined it, that several notes had been presented to him which had his name signed to them, but that his name to such notes had been forged by W. W. Norris; that he did not like to speak of the forgeries committed by Norris, as it was a delicate subject, Norris being his son-in-law, having at different times married two of his daughters. He requested the agent not to be uneasy, or give himself any trouble about the note; that it is and was all right, and would be paid, and promised to pay his proportion of it. A witness, Dow, having expressed the opinion that the signature of Cope to the note was genuine, the plaintiff, in confirmation of his evidence, offered a paper in the possession of the witness, known to be signed by Cope, in order that the jury might compare the

signature to the paper with that to the note. This paper was excluded by the court. Evidence on the part of the defendants was given tending to show that the signatures of Spenny and Cope were well imitated, but that they were not genuine and had been forged by Norris. There was also given to the jury evidence showing that Norris was a skillful penman and could imitate exactly almost the signatures of others, and capable of committing forgery so well as to deceive even the person whose name was forged. The admission of this evidence was excepted to by the plaintiff. There was a verdict for the defendants.

All of the instructions will not be noticed, as they are numerous, and, from the state of the pleadings, could not legally affect the determination of the controversy. The only matter in issue was the execution of the note sued on by Cope and Spenny. There was no foundation in the pleadings for any other instruction than one relating to the execution of the instrument on which the suit was founded. There is no ground for an estoppel. If Spenny had assured a third person that his signature was genuine, and that person had paid value for the note in consideration of such assurance, there might be some room for the doctrine of estoppel.

Standing as the case did before the jury, the first instruction given by the court for the defendant was clearly erroneous. The instruction was to the effect that it devolved on the plaintiff to prove that the signatures of Cope and Spenny to the note were genuine. Now what idea did the court attach to the word "genuine?" Was it intended to signify that the names must have been written by the parties themselves and with their own hands, and that they could not by adoption make a signature of their name made by another their own act? If such was the design of the instruction, it was not the law. If such was not its purpose, then it is erroneous as tending to mislead the jury. It is competent to a person to make a note his own either by signing it with his own hand or by adopting the signing made by another in

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his name, although without any previous authority. There was evidence before the jury from which they should have been left to determine whether Spenny did not adopt the act of Norris. Unless Spenny either signed the note himself, or made the authorized signature his own by adoption, it is clear that there is no foundation in the pleadings for a judgment against him, and therefore we do not see what the statute of frauds and perjuries has to do with the case.

We find the law, so far as we have been enabled to examine, against the admission of the evidence relative to the skill of Norris in imitating the handwriting of others and his capability of committing forgery. In the case of *Balcetti v. Serane*, Peake's N. P. 192, it was held that in an action against the acceptor of a bill of exchange, who defends himself on the ground of his acceptance being forged by another, evidence that that person forged the acceptor's name to an other bill and absconded on that account is not admissible. The case of *Rowt's adm'r v. Kile's adm'r*, *Gilmer*, 202, would seem to intimate a contrary doctrine; but the subsequent case of *Viney v. Barss*, 1 Esp. N. P. 292, meets the point of distinction made in the case in Virginia, and holds that when a party defends a bill of exchange on the ground that his acceptance has been forged, it is not admissible evidence that the party who negotiated such bill had been guilty of other forgeries.

The evidence in relation to the comparison of handwriting was properly excluded, as the fact did not bring the case within the rule as stated by Greenleaf. (1 Greenl. Ev. 581.)

The other judges concurring, judgment reversed and remanded.

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THE STATE, Respondent, v. DAVIS, Appellant.

1. Where an indictment contains two counts, one founded on the 35th, the other upon the 39th, section of the second article of the act concerning crimes and punishments, (R. C. 1855, p. 565, 567,) and both counts relate

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- to the same transaction, the defendant is not entitled to demand that the prosecution shall select the count upon which the defendant shall be tried.
2. Every felonious act must be charged to have been feloniously done; this requirement will be satisfied, in an indictment founded upon the 39th section of the second article of the act concerning crimes and punishments (R. C. 1855, p. 567,) by an averment that the assault was made feloniously and that the striking, cutting and thrusting were done feloniously, although the maiming, wounding, disfiguring or doing great bodily harm may not be directly charged to have been done feloniously.
  3. Principals in the first and second degrees are in law equally guilty; there is no difference in the grade of their offences. The one charged as principal in the first degree, if properly indicted himself, can not take advantage of defective averments, if any, against those indicted as principals in the second degree.
  4. It is not good cause of challenge to a juror in a criminal case that he has formed or delivered an opinion on the issue or any material fact to be tried, if it appear that such opinion is founded only on rumor and not such as to prejudice or bias his mind. (R. C. 1855, p. 1191, § 14.)
  5. Testimony can not be introduced to show that a witness had made statements contradictory of those made upon the witness stand, unless a foundation be first laid for such testimony by calling the witness' attention to the matter about which he is to be contradicted and thus giving him an opportunity to explain.

*Appeal from Osage Circuit Court.*

It is sufficient to state, in addition to the facts stated in the opinion of the court, that the court, at the instance of the State, gave the following instructions bearing upon the second count of the indictment: "2. If the jury believe from the evidence that the defendant within three years next before the finding of this indictment, and in Osage county, wilfully and feloniously made an assault with a knife, being a deadly weapon, likely to produce death or great bodily harm, and inflicted a wound upon the face of said Berry, or upon the side, or upon any other part of the body of the said Berry, whereby the said Berry was wounded, disfigured, or received great bodily harm, then the jury must find him guilty under the second count of the indictment, and in that case must assess his punishment by imprisonment in the penitentiary, &c. 5. Although the jury should believe from the evidence that Berry struck defendant with a knife or snapped a pistol at him, yet if the defendant was pursuing



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him to assault him or to inflict on him great personal injury, and there was reasonable cause for Berry to apprehend immediate danger from such assault or injury, then Berry had a right to strike or shoot, if necessary, in his self-defence; and if, under such circumstances, defendant assaulted Berry as described in the first or second instruction, he was not justified in so doing. 6. Mere words of insult or banter, even if Berry had first used them, constitute in law no provocation or excuse to justify an assault or wounding."

The court, at the instance of defendant, gave the following instruction bearing upon the second count: "1. Although the jury may believe from the evidence in this cause that the defendant Thomas Davis inflicted the wounds upon the person of Robert Berry, yet if they further believe that they [were] inflicted in the lawful defence of himself; or if Davis had reasonable cause to apprehend a design on the part of Berry to do him (Davis) some great personal injury, and that Davis had reasonable cause to apprehend immediate danger of such design being accomplished, they will find the defendant not guilty."

The court refused many instructions asked by the defendant. It is unnecessary to set them forth.

*Ewing & Parsons*, for appellant.

I. The court should have quashed the second count of the indictment. It does not charge the maiming, wounding, disfiguring, &c., to have been done feloniously. (See *State v. Feaster*, 25 Mo. 325; *State v. Leonard*, 22 Mo. 449.) It also first charges that the codefendants of Davis were principals in the first degree, and afterwards charges said codefendants as principals in the second degree.

II. The court should have declared the jurors Shackelford, Miller and others incompetent to sit as jurors. They said that their opinion in regard to the issues were so fixed in their minds as to require evidence to remove it.

III. The court should have permitted the defendant to contradict the testimony of Mrs. Rosson.



IV. The court erred in giving the second instruction. The felonious assault was not the gist of the action ; it was the felonious wounding. The instruction takes from the jury all consideration of provocation or self-defence. There was evidence tending to show that the wounding, disfiguring, &c., was done in self-defence. The fifth instruction was erroneous. The court should have given the instructions asked by defendant.

*Knott*, (attorney general,) for the State.

I. The second count of the indictment is good. Principals in the first and second degrees are equally guilty. The offence may be charged as the joint act of all, and the part performed by each then set forth, or the part that each performed may be first set out and then the conclusion drawn that all are guilty. The word "feloniously" placed before "strike, cut and thrust" relates to and is descriptive of the wounding, disfiguring, &c., mentioned as the consequence of the striking, cutting, &c., and need not be repeated. (2 Hale P. C. 185 ; Bac. Abr. tit. Indict. 556 ; State v. McGrath, 19 Mo. 678.) In the case of the State v. Feaster, the act done with the weapon was not charged to have been done feloniously. If the defendant feloniously struck, and the wounding was the immediate consequence of the stroke, it would be absurd to say that the wounding was not feloniously done, or that it was not so charged.

II. The court properly refused to compel the circuit attorney to elect upon which count of the indictment he would proceed. (State v. Jackson, 11 Mo. 544 ; State v. Leonard, 22 Mo. 449 ; State v. Porter, 26 Mo. 201.)

III. The jurors Shackelford and other were competent. There is nothing in the fact that "it would require evidence to remove the opinions they had entertained." (See R. C. 1855, p. 1191, § 14 ; State v. Baldwin, 12 Mo. 224.)

IV. The court properly refused to permit the witness Davis to detail a conversation he had with Mrs. Rosson. No foundation was laid for contradicting the witness with a

view to discredit her. (Greenl. Ev. § 462; Roscoe's Cr. Ev. 183.)

V. The instructions given to the jury were correct. There was no error in refusing the instructions asked by defendant.

SCOTT, Judge, delivered the opinion of the court.

The defendant Davis was indicted, with three others, under the 35th and 39th sections of the second article of the act concerning crimes and their punishments. There were two counts in the indictment; the one on the 35th, and the other on the 39th of said sections. The first charges a wilful felonious striking with a dangerous weapon, on purpose and of malice aforethought, with the intent, then and there, Robert Berry wilfully, feloniously, on purpose and of his malice aforethought to kill. The second count charges that the defendant, with three others, on, &c., at, &c., in and upon the body of one Robert Berry, wilfully and feloniously an assault did make; and that he, the said Davis, with a certain knife, then and there being a deadly weapon which he, the said T. Davis, in his right hand had and held, the said Robert Berry, in and upon the left side, &c., then and there, wilfully and feloniously did strike, cut and thrust, giving to the said Robert Berry, then and there, with the knife aforesaid, in and upon the left side, &c., several dangerous wounds, whereby he, the said Robert Berry, was then and there greatly wounded and disfigured, and received great bodily harm; and that the said John Davis, William Gilmore and Oscar D. Hancock, then and there, wilfully and feloniously were present aiding, helping, abetting, assisting and maintaining the said Thomas Davis the felony aforesaid, in manner and form aforesaid, to do and commit, contrary to the form, &c.

Thomas Davis, who is charged in the indictment as the principal in the first degree, elected to be tried separately, was convicted and appealed to this court. Before his election of a separate trial a motion was made to quash the indictment on grounds, some of which did not affect this defen-

dant, and he can not therefore avail himself of any advantage to be derived from them. If he is properly indicted as a principal in the first degree, he can not complain that those joined as principals in the second are not properly charged with an offence. The subject has of late been so frequently before the court, that it was generally supposed to be settled, that there is no difference in the guilt of principals in the first and second degree. A principal in the first degree is he who actually commits the crime. A principal in the second degree is he who takes not part in the actual commission of the offence, but is present aiding, abetting and assisting him who does. As the guilt of these parties is in the eye of the law equal, they are all punished alike; and if he, who is only present aiding and abetting those who actually commit the offence, is indicted as the actual perpetrator of it, the indictment is good, and is supported by proof of his presence and countenance, for they in the contemplation of the law are all principals. (State v. Phillips & Ross, 24 Mo. 475.)

The indictment as against the principals in the second degree has been compared with the approved precedents, and it substantially conforms to them. (3 Chitty's Crim. Law, 792.) The words of the section, under which the second count of the indictment is framed, are—"if any person shall be maimed, wounded or disfigured, or receive great bodily harm, &c., by the act, procurement or culpable negligence of another," &c. Now these words do not require as a part of the description of the offence that the wounding should be felonious. Every felonious act must be charged to have been done feloniously, and the crime here charged is a felony; but this requirement is satisfied by the averment that the assault was made, and that the striking, cutting and thrusting was feloniously done. If the blow which causes a wounding is inflicted feloniously, the wound, the consequence of the blow, must have been made with a felonious intent. Chitty says, it is not necessary to repeat the words "feloniously and of malice aforethought" to every allegation; for if the assault be stated to have been thus made, and the in-

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dictment proceed to aver that the defendant *then and there* struck, &c., it will be good without repeating them, because the acts are sufficiently connected. (3 Chitty C. L. 738; 4 Coke, 41, *b*.)

The defendant had no right to compel the State to elect on which count in the indictment she would try him. As but one offence was committed, and the two counts related to the same transaction, it was entirely competent to the State to vary her charges by means of several counts, although under different sections of the statute, so as to meet the proof which might be produced. (State v. Porter, 26 Mo. 201.)

The objection to the competency of the jurors can not be sustained. The jurors were examined on their *voir dire*, and stated that they had formed an opinion, but it was upon rumor, and was not such as to bias or prejudice their minds. This has long been the law in this state, and such jurors have invariably been held competent; and the course of decision will not be varied because complaisant men, in a long course of cross-examination by counsel, may give an answer somewhat favorable to those who may wish to exclude them. Such is the growing aversion to serving on juries, that unless this rule is adhered to it will be impossible to obtain competent jurors.

Although the bill of exceptions states that a ground was laid in the examination in chief of Mrs. Rosson for contradicting her, yet that was by way of recital; and we do not find in the evidence of that witness as preserved in the record any sufficient foundation for that purpose. A witness, who will give contradictory accounts of a transaction, can not be relied on, but it is very unsatisfactory evidence to prove that a witness has contradicted himself, unless the witness is first apprised of the matter about which he is to be contradicted and of the circumstances and occasion of the declaration. By giving him an opportunity, it may be in his power to explain the matter, to show that he was mistaken, and thereby remove any improper impressions his apparently contradictory declarations may have produced.

As the defendant was found not guilty of the first count in the indictment, it will not be necessary to review the instructions founded on the law peculiar to that count. This will relieve us of the necessity of going into the subject of malice involved in the section on which that count is founded.

The complaint of the second instruction given on the part of the State is in a great measure a revival of the objections urged against the second count on the motion to quash the indictment. Without repeating what has been already said in relation to the sufficiency of the second count of the indictment, it may be remarked that this indictment avoids the objection taken to that of the State v. Feaster, 25 Mo. 325; for it alleges that both the assault was made feloniously, and that the defendant was feloniously stricken, bringing it within the very requirement of that case.

If the second instruction given for the State had stood alone, it could not under the circumstances have been sustained. But the defects of that instruction were cured from the manner in which the first instruction given for the defendant was framed. It was so worded that it must have drawn the attention of the jury to the second instruction given on the part of the State, and the two would necessarily be understood as standing together.

It has already been observed, that the instructions on the subject of malice are out of the case, as the defendant was acquitted of the first count, the only one on which it was material to consider that matter.

The first instruction given for the defendant having stated the circumstances under which his assault on Berry would have been justifiable, the court properly refused the other instructions on that subject, as they were not only unnecessary, but failed to state in a proper manner the facts required by the statute in order to mitigate a felonious assault to one that was justifiable.

Judge Napton concurring, judgment affirmed.

## THE STATE, Appellant, v. HERREFORD, Respondent.

1. State v. Davis, ante, p. 391, affirmed.

*Appeal from Barry Circuit Court.*

This was an indictment founded upon the 39th section of the second article of the act concerning crimes and punishments.

*Knott*, (attorney general,) for the State.

I. The indictment is sufficient. (*Jennings v. State*, 9 Mo. 852; *State v. McGrath*, 19 Mo. 679; 11 Mo. 582.)

SCOTT, Judge, delivered the opinion of the court.

There is but one offence charged in the indictment. An indictment similar to this was held good at this term in the case of the *State v. Davis*.

Judge Napton concurring, the judgment will be reversed and the cause remanded, with an order that the defendant appear at the next term of the Barry circuit court to answer the indictment.



## INGE, Respondent, v. HANCE, Appellant.

1. Parol evidence is inadmissible to show that a note absolute on its face is payable at a time different from that stated therein.

*Appeal from Phelps Circuit Court.*

*Henderson*, for appellant.

*C. Jones*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action on a promissory note dated July 2, 1858, payable one day after date. The answer admits the execution of the note, but alleges an oral contemporaneous



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agreement between the plaintiff and defendant by which it was not to be paid until after the lapse of six months, unless the defendant's "*circumstances in life as to responsibility should change,*" and it is averred that they have not changed. The answer was, on motion, stricken out. This case involves the same point decided at this term, in the case of Chrisman & Smart, adm'rs of Smith, v. Thomas; and for the reasons given in that opinion, the judgment will be affirmed. The other judges concurring.

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FOOTE *et al.*, Appellants, v. NEWELL *et al.*, Respondents.

1. By the provisions of an act of the legislature of the state of Indiana the defendant in an execution was entitled to "replevy" the same, and obtain a stay of execution for a specified period by giving a bond with securities in double the amount demanded by the execution, and conditioned for the payment of the full amount of the execution, with interest and costs at the expiration of the stay of execution. This bond the officer was to return with the execution to the office of the clerk who issued the execution, and it was made the duty of the said clerk to record the same. The act further provided as follows: "And such bond, from the date of its execution, shall be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue thereon accordingly." A judgment was obtained in Indiana, and a bond was duly executed and filed and recorded under the provisions of the above act. *Held*, that such bond could not be sued on in the courts of this state as a judgment of a court of the state of Indiana; that it was not entitled in this state, under the constitution of the United States and the act of Congress, to full faith and credit as a judgment of the state of Indiana.

*Appeal from Gentry Circuit Court.*

The thirteenth and fourteenth sections of the act of Indiana of February 4, 1831, are as follows: "Sec. 13. That any person or persons, against whom any judgment may be obtained, may have stay of execution thereon of thirty days, if the sum for which such judgment shall have been rendered shall not exceed six dollars; and a stay of execution of sixty days if such sum exceed the sum of six dollars and

does not exceed the sum of twelve dollars ; and a stay of execution of ninety days if such sum exceed twelve dollars and does not exceed twenty dollars ; and a stay of execution of one hundred and twenty days if such sum exceed twenty dollars and does not exceed forty dollars ; and stay of execution of one hundred and fifty days if such sum exceed forty dollars and does not exceed one hundred dollars ; and a stay of execution of one hundred and eighty days if such sum exceed one hundred dollars ; by procuring one or more sufficient securities to enter on the record of the court rendering such judgment a recognizance, acknowledging himself, herself or themselves bail for the payment of such judgment, together with the interest and costs accrued, accruing and to accrue thereon, which recognizance may be entered in open court or before the clerk of said court, and the same shall be considered as, and have the force and effect of, a judgment confessed in a court of record against the person or persons acknowledging the same, and their estates, and execution may issue thereon accordingly. Sec. 14. That when execution of any kind may issue upon any judgment upon which no stay of execution may have been taken under the provisions of the thirteenth section of this act, the officer issuing the same shall endorse thereon that the same is repleviable, and also the costs of the rendition of such judgment ; and the person or persons against whom such execution may have been issued may replevy the same for the length of time specified in the said thirteenth section of this act and from and after the date of the rendition of such judgment, and the same may be endorsed on such execution aforesaid, by tendering to the officer having such execution in his hands a bond with one or more sufficient freehold securities, made payable to the execution plaintiff, in a penalty of at least double the amount demanded by such execution, and conditioned for the payment of the full amount demanded by such execution, together with the interest and costs accruing and to accrue thereon, at the expiration of the stay of execution to be fixed according to the provisions of this section

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and the said thirteenth section of this act ; which bond shall be returned by the officer returning the execution, as a part of his doings thereon, to the office of the clerk from whence such execution issued ; which bond shall be by such clerk recorded ; and such bond from the date of its execution shall be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue thereon accordingly."

*Lewis & Shambough*, for appellants.

I. The court erred in permitting the defendants to file an answer at the succeeding term, and in overruling plaintiffs' motion to strike out the answer. The court also should have sustained the motion to strike out parts of the answer. The court should have given the declarations of law asked. The bond had the force and effect of a judgment confessed. It is within the act of Congress. No lapse of time short of twenty years is a bar to the action. (*Manning v. Horan*, 26 Mo. 570.)

*Vories & Vories*, for respondent.

I. The court properly overruled the motions to strike out the answer and parts of the answer. It was filed before default was taken. The bond is not a judgment of a sister state within the meaning of the constitution and act of Congress. (See 6 Mo. 463 ; 1 Mo. 375 ; 3 Mo. 84 ; 23 Mo. 375.) This action is not founded upon the original judgment obtained, but upon the bond. The prayer is for the penalty of the bond.

Scott, Judge, delivered the opinion of the court.

This is an action on what is alleged to be a judgment of the court of a sister state.

The petition states that the plaintiff, at a term of the circuit court for Wayne county, in the state of Indiana, on the 2d day of November, 1840, recovered a judgment in debt for

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\$201.25 against the defendants Curtis, Newell and Hiram Morlan ; that afterwards, in November, 1840, an execution issued on said judgment against said defendants endorsed by the clerk of said court ; that the same was for making the sum therein named with interest therefrom from the 4th of November, 1840, and might be replevied according to law ; which said execution was afterwards, to-wit, on the 30th day of January, 1841, returned by the sheriff of the said county of Wayne, endorsed "replevied by taking a replevin bond" and returning the same to the clerk of said court, executed by the defendants Hiram Morlan, Charles B. Newell, Joshua Cranor and Harmon Roland, on the 30th day of January, 1841, to the plaintiffs in the sum of \$419.41, conditioned that should the said obligors, or either of them, well and truly pay to the said plaintiffs the said sum of \$201.25, the amount of said judgment, together with the interest and costs accruing and to accrue thereon, at the expiration of the time given by law, the said bond to be null and void ; otherwise to remain in full force ; which said bond was duly entered by the clerk of said court on the order book of said court ; all of which will more fully appear by a duly and legally certified copy of said judgment and bond, with all the proceedings done and had thereon herewith filed. The petition further alleged that by virtue of an act of the general assembly of the state of Indiana entitled "An act subjecting real and personal property to execution" approved January 4, 1831, and in force at the rendition of the said judgment, of issuing said execution, and of taking, returning and entering said bond on the order book of said court, the said bond, so entered into by the said obligors and so entered on the order book of said court, became, and from the date thereof had the force and effect of, a judgment confessed in said court by the said obligors so executing the said bond and against their estates, and execution might issue thereon accordingly. The petition then recites some payments on the judgment, and states the balance of it to be \$61.83 with interest, and that the judgment for the amount is still in

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force and effect and unreversed and unsatisfied ; and that the said bond still remains in full force and effect, not reversed, satisfied or otherwise vacated ; whereby an action has accrued to the plaintiffs to demand and have of the defendants the sum of \$419.41, and therefore ask judgment for that amount.

Two of the defendants answered, Joshua Cranor and Chas. Newell, denying that any action accrued on the bond to the plaintiffs whereby they were bound for the sum claimed in the petition. They deny that they were ever served with any process, and plead the statute of limitations of ten years. There were motions to strike out the answer and parts of it, which were overruled. The suit was discontinued as to the defendants not answering. By consent the cause was submitted to the court. The record of the Indiana judgment, and the subsequent proceedings thereon as stated in the petition, were read in evidence. The statute of Indiana was also read in evidence, which directed the bond, executed under the circumstances detailed in the petition, to be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates. The court refused an instruction, asked by the plaintiffs, that the act of the legislature of the state of Indiana read in evidence gives to the bond in evidence in this cause the force and effect of a judgment confessed in the circuit court of Wayne county, in the state of Indiana, against the parties to said bond, and said judgment is binding and obligatory on the defendants in the courts of this state, and may be sued upon as a judgment of a court of record, and judgment may be recovered on the same in the courts of this state. There was a judgment for the defendants.

The constitution of the United States prescribes that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved,



and the effect thereof. The act of Congress of May 26, 1790, pointed out the manner of authenticating the said acts, records and proceedings, and declared that the records and proceedings should have such faith and credit given them in every court within the United States as they have by law and usage in the courts of the state from whence the said records are or shall be taken. The question involved in this cause is not what faith and credit shall be given to a judicial proceeding of a sister state, but whether the instrument, the foundation of the action, is a judicial proceeding within the meaning of the constitution and the law. Indeed, if this is a judicial proceeding, it is difficult to find a reason why a state may not declare any contract or undertaking, on being filed with the clerk of a court of record, a judgment by confession and having the force and effect of a judgment, and thus make it a judicial proceeding within the meaning of the federal constitution. The statute of Indiana itself did not regard the proceedings under the execution as judicial, for if it had been so regarded it would not have been necessary to declare that the bond be taken as, and have the effect of, a judgment confessed in a court of record. It is not usual for a tribunal performing judicial acts to declare the character of the acts; it is sufficiently apparent from the face of the proceedings themselves.

If a state, in carrying out a policy of her own, disapproved or discountenanced in other states, finds it convenient to give to proceedings having no affinity to judicial ones the force and effect of judgments, the other states are not required by the constitution to give to those acts the force and effect they may have in the state by which they were authorized. Comity requires that nations should respect the judicial proceedings of each other. The constitution exacts this comity between the states as a duty and carries it further than the comity among foreign nations extends. Under these circumstances, it would be great perversion to require the states to give to any contract or undertaking, declared by a state to be a judgment for the sake of a speedy remedy, the force and effect of a judi-



cial proceeding. The bond is a penal one, being for a sum double the amount of the original judgment. We know how to deal with a penal bond; but what is to be done with a penal judgment? The plaintiffs claim the amount of the penal bond, which they maintain is a judgment within the meaning of the constitution of the United States. We are not informed whether, by the law of Indiana, an execution issues for the entire penalty, or for the amount due on the original judgment. We may form a conjecture on this subject, but how singular in judicial proceedings is a judgment for a penal sum to be discharged by the payment of a less at a given time, otherwise to remain in full force. The statutory proceedings and judgment on a penal bond furnish no support to such a course. In such cases, the amount of the damages is ascertained for which the execution is awarded. Can this judgment be said to be final and complete at the date of the bond, if its existence or nonexistence is made by its terms to depend on the happening of a future event? Before the courts here can declare that this is a judgment to be carried into effect under the constitution, must not the court of the state, where it was rendered, have previously determined whether the event had occurred on which its validity is made to depend? If our courts do this, are they not merely rendering a judgment in the first instance ancillary to the foreign courts, not carrying their judgments into effect, but aiding them in forming the original judgment?

We do not deem it necessary to express any opinion in relation to the action of the court below on the answer, nor as to the sufficiency of it, as the plaintiff by his own showing is not entitled to recover.

If the bond is to be regarded as a bond, the ten years' limitation would bar an action on it, unless the plaintiffs bring themselves within some exception. The cause of action accrued after the 1st of December, 1835, and this action was commenced in 1859, when the limitation act of the code of 1855 was in force. The cause of action on the bond accrued when the act of 1835 was in force; hence by the provisions

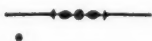
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of the act of 1855 the statute of limitations of the code of 1835 would govern the action. Under this statute, the statute of limitations did not commence running in favor of the defendants until they came into the state. (Thomas v. Black, 22 Mo. 322; Tagart, adm'r of Stone, v. The State of Indiana, 15 Mo. 212.) We do not see how an action could be maintained on the bond as such, unless the original was produced.

If the bond is to be regarded as a judgment, then the limitation act of 1835, so far as it relates to the judgments, would be the law of the case. Affirmed.



## BAILEY, Respondent, v. WALKER, Appellant.

1. A promise, to support an action, must be founded on a sufficient consideration.

*Appeal from Phelps Circuit Court.*

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

*Parsons*, for appellant.

*Thomas & Jones*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The plaintiff claimed two hundred dozen of oats at twenty-five cents per dozen, amounting to fifty dollars. The evidence shows that he was only to have the oats on paying for the harvesting and stacking of them. If, then, he received the full value of the oats as claimed, he received more than he was entitled to, as he should have allowed the defendant what was due him for harvesting and stacking them. The record states that the sum agreed upon was one hundred and thirty-three and one-half dollars. This, we suppose, is a mistake, but it would have been better if the parties had amended the record, if there was a mistake in it.

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All that the plaintiff was entitled to was damages for a breach of the defendant's undertaking, if there had been a valid and binding one. It does not appear that the plaintiff ever paid for the oats. If he had not, he certainly was not entitled to recover the value of them. It appears that the mother of the plaintiff had the greatest share of the oats, for they were all in one rick, and there is no evidence showing that she ever authorized her son, the defendant, to intermeddle with them in any way. The interest of her and her husband in the oats was undivided. The husband alone could not authorize the interference of a third person, for in this matter we are to look upon the husband and wife as two persons, as they were so regarded by all the parties to this transaction. The contract with the defendant about his pay for harvesting and stacking the oats was with the husband of his mother. From all we can see, the undertaking of the defendant was a voluntary one—there was no consideration for his undertaking to the plaintiff; and so the court seems to have regarded the matter, for the only instruction given for the plaintiff, and on which the case must have turned, is entirely silent as to any consideration being necessary to support the promise. If a man without any consideration promises to do a thing and fails to do it, he can not be sued for such failure; but if he does undertake it and by negligence does it in a manner to cause loss to him for whom he is acting, he will be bound to make good that loss. The other judges concurring, the judgment will be reversed.

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PEMBERTON, Plaintiff in Error, v. PEMBERTON *et al.*, Defendants in Error.

1. A bequest of personal property by a husband to his wife would be no bar, under the tenth section of the dower act of 1845, (R. C. 1845, p. 431,) to her right of dower in the real estate of the husband.
2. Whether such a bequest would, if accepted, be a bar to the widow's right of dower in the residue of the personal estate must depend upon the intent and meaning of the will of the husband. If it is manifest from a fair con-

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struction of the will that the testator intended the bequest to be in lieu of dower, the widow must make her election ; she can not accept the bequest and also claim dower as allowed by law.

3. If a husband bequeaths to his widow a slave belonging to his children by a former marriage, and makes those children his residuary legatees, they will be put to their election, either to relinquish the slave or to renounce the legacies ; they can not take both under and against the will.

*Error to Callaway Circuit Court.*

In 1853 Edmund Pemberton, the husband of Jane Pemberton, the plaintiff, died, having made a will, which substantially is as follows : " Know all men, &c., that I, Edmund Pemberton, of, &c., do this 29th day of April, 1853, make my last will and testament as follows : First, my funeral expenses and all my just debts to be paid ; second, I will and bequeath to my wife Jane Pemberton a certain portion of my land, commencing, &c., [describing a tract of about eighty-six acres, including the dwelling house,] to belong to her with all the appurtenances thereunto belonging during her natural life or widowhood, and then to belong to my three youngest children William R. Pemberton, Thomas M. Pemberton, Franklin P. Pemberton ; thirdly, I also will my wife the household and kitchen furniture, with the exception of three beds, bedsteads and furniture ; fourthly, one dun mare and colt, and one bay mule ; fifthly, two cows and calf ; sixthly, twenty head of hogs ; she is to select them from the lot of hogs ; seventhly, she is also to have fifteen head of sheep ; she is to select them from my flock ; eighthly, she is also to have my small wagon and harness ; ninthly, she is also to have two diamond plows, one a two-horse plow, the other a one-horse plow, and two hoes ; tenthly, she is also to have all the wheat that is cleared out and boxed up ; eleventhly, I also will my wife Jane Pemberton my negro boy Lewis ; twelfthly, all the corn that is in the crib at this time is to be used by and for the benefit of the family that remains on the farm the present year. The above named negro boy is at the death or marriage of my wife Jane Pemberton to belong to my three youngest children as the land. The

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above named beds are to be good feather beds, good bedsteads and furniture. The above named beds I will and bequeath, one to my son James R. Pemberton, one to my son Edmund P. Pemberton, one to my son Joseph H. Pemberton. All the produce that is raised on the farm the present year I will one-half to my wife Jane Pemberton, the other half to be equally divided between Edmund P. Pemberton and Joseph H. Pemberton. All the tobacco on hand, negroes, land, and all the property not heretofore named is to be sold at public auction, the proceeds thereof first to pay all my just debts, the balance to be equally divided between my six oldest children, John Q. Pemberton, James R. Pemberton, Edmund P. Pemberton, Joseph H. Pemberton, Martha A. Gilbert, Mary Bradley; and lastly, by these presents, I appoint my son Edmund P. Pemberton my whole and sole executor," &c.

The widow Jane Pemberton seeks in the present suit to have dower assigned her in the proceeds of certain slaves, Abigail, Rachel, Sanders, and Martha, that had been sold by the executor of the will of said Edmund Pemberton. The defendants are the six oldest children of said Edmund Pemberton, being his children by a former marriage. They in their answer set up that said slaves belonged to them by virtue of a gift from their grandfather Nehemiah Hendley, the father of Edmund Pemberton's first wife, who, it is alleged, gave said slaves to his daughter Susan Pemberton for life with remainder to her children. Defendants also claim said slaves under the will of Edmund Pemberton. After the death of said E. Pemberton, the defendants recovered possession by suit of said slave Lewis from the widow Jane Pemberton, on the ground that said slave belonged to them under the gift of their grandfather and not to their father.

This cause was tried by the court without a jury; the court found for the defendants, holding the plaintiff barred of dower in the personalty by her election to take under the provisions of the will and her acceptance of the property devised to her.

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*Jones & Hayden*, for plaintiff in error.

I. The devise of the real estate and the several bequests of personal property and the slave Lewis do not bar the widow of dower in the personal estate. Such provisions, although accepted, do not preclude her from claiming dower in the personal estate. (2 Story Eq. § 1088; 1 White & Lud. L. Cas. 311; Co. Litt. 176, *b.*; 16 Mo. 242; 21 Mo. 519; 24 Mo. 176; 23 Mo. 398; 5 Mo. 183; 18 Mo. 389; 19 Mo. 469; 9 Mo. 10; 2 Sch. & Lef. 452; 8 Paige, 325; 5 Paige, 597; 5 Dana, 345; Riley's Ch. 205; 2 Yeates, 433; 4 Johns. Ch. 9; 10 Paige, 366; 1 Sandf. 325; 5 Hill, 206; 2 Denio, 430; 2 Hill, Ch. 46; 1 Speers' Eq. 322; 5 Dana, 345; Saxt. Ch. 217; 4 Hen. & Mun. 23; 4 Dess. 274; 1 Benn. 565; 4 Dall. 415; 3 Yeates, 10.)

II. If such devise and bequests bar her dower in the personal estate, she is entitled, in the case of the failure of the title to the slave Lewis, to have the deficiency made up out of the personal estate. (4 Kent Com. 54, 55; Plowden, 525; Litt. Sec. 287; Co. Litt. 185, *b.*; Perkins, § 526; Doctor & Student, 1, 2, 126, 300; 3 Co. 29, *a.*)

*Ansell*, for defendants in error.

I. The widow was barred of a right to dower in the personalty. She was put to her election. She can not claim under and against the will. (See 2 Story Eq. p. 440; 3 Yeates, 10; 7 Cow. 287; 3 Fairf. 138; 8 Gratt. 83; Addis, 350; 2 Yeates, 302; 27 Engl. L. & Eq. 154; 1 Den. & War. 94; 4 Monr. 265; 5 Monr. 58; 4 Dess. 146; 2 McCord Ch. 280; 7 Cranch, 370; 5 Call, 481; 1 Edw. 535; 3 Russ. 192; 2 Dana, 343.) The second instruction asked was properly refused. The petition does not allege any partial failure of the provision made for the widow in the will. There is nothing said about the slave Lewis in the petition.

SCOTT, Judge, delivered the opinion of the court.

This is a suit for the assignment of dower under the dower law of the code of 1845. The testator having devised both



real and personal estate to his wife, the question arises whether that devise, if accepted, bars the widow's right to dower in both the real and personal estate. The tenth section of the dower act of the code of 1845, and which is continued in the present code, provides, if any testator by will shall pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of her husband whereof he died seized, unless the testator, by his will, otherwise declare. In the case of *Halbert v. Halbert*, 19 Mo. 453, it was held that the bequest of a slave to a wife, under the section just referred to, did not bar her dower in the real estate. The spirit of this decision is that the tenth section of the act relates to dower in the real estate only, and does not affect the wife's dower in the personalty. We are of the opinion that this is the obvious intention of the act, and that the section was designed only to extend to real estate, and left the question, how far a bequest of personal estate would bar dower in such estate, to be determined by the rules of the common law. Our statute, unlike the common law, gives a legal right to dower both in the personal and real estate; and a devise or bequest in one is no bar to dower in the other, unless it is so declared by the testator.

This case, then, presents the question, whether the bequest of the personalty to the wife is a bar to her right of dower in the residue of such estate, or whether it is cumulative and to be received in addition to dower. Story thus states the rule: "If a testator should bequeath property to his wife manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free from ambiguity; and it will not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own subject to dower. There is no repugnancy in such a devise or bequest to her title to dower. Besides, the right to dower being in itself a clear legal right, an intent to exclude that right by a voluntary gift ought to

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be demonstrated either by express words or by clear and manifest implication. In order to exclude it, the instrument itself ought to contain some provision inconsistent with the operation of such legal right." (§ 1088.) In the case of *Herbert and others v. Wren and others*, 7 Cranch, 378, Judge Marshall says, "It is a maxim of a court of equity not to permit the same person to hold under and against a will. If, therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to dower, but to be in lieu of it; if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both." In that case, on the will itself, the court determined that the testator did not intend the provision made for his wife to be additional to her dower, and she was not permitted to hold both.

This court would have been aided in its deliberations, if the parties had put the inventory and appraisement of the estate in the bill of exceptions, that it might plainly appear what proportion the personalty bequeathed to the wife bore to the whole estate. But, notwithstanding this omission, the record furnishes some guide on this subject, and satisfies us that the dower given by law did not greatly, if any, exceed the provision made by the will. The family residence is devised to the wife, with a portion of the adjoining farm; the testator evidently contemplating that his widow would carry on the business of farming after his death. Now the particularity with which he specifies the number of each kind of stock, and the various kinds of implements of husbandry, is entirely inconsistent with the idea that she should have any others than those enumerated. Such an enumeration was entirely unnecessary if she was to have any more than what was enumerated. The statute giving dower in

personalty says it is in the personal estate. The testator, therefore, seems to have given a share in every part of it when he did not give the whole. No one acquainted with the modes of thinking and doing business prevailing among the people of Missouri would ever say that the testator, in the will before us, intended that the widow should take both her dower and the provision made for her by the will out of the personal estate. Our statute declares that all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them.

The facts of this case present one of election on the part of the defendants. Story says (§ 1076) "If a testator should devise an estate belonging to his son or heir at law to a third person, and should in the same will bequeath to his son or heir at law a legacy of one hundred thousand dollars, or should make him the residuary devisee of all his estate, real, personal and mixed, it would be manifest that the testator intended that the son or heir should not take both to the exclusion of the other devisee; and therefore he ought to be put to his election which he would take; that is, either to relinquish his own estate or the bequest under the will." This would be a case of implied or constructive election. The facts of the present case bring it clearly within the principle stated. The testator devised a slave belonging to the children of his former wife to the plaintiff and made those children his residuary legatees. Now those legatees can not take under the will and against it. If they will take the legacy, they must renounce the slave bequeathed to the wife. The testator did not intend that they should take both to the exclusion of his wife. They must, therefore, be put to their election either to give up the slave, or to hold their legacy of the residue of the estate subject to the claim of the wife for the value of the slave. (Story's Eq. § 1082, 3, 4.) As this proceeding was not prepared with an eye to any such relief, the judgment will be reversed at the costs of the plaintiff, and

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the cause remanded that the petition may be amended, if the plaintiff desires to do so.

Judge Napton concurring, judgment reversed and cause remanded.

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THE STATE, Respondent, v. SPAIN, Appellant.

1. In an indictment for selling liquor without a license it is not necessary to state to whom the sale was made, or that it was made to some person or persons to the jurors unknown.

*Appeal from Webster Circuit Court.*

*Waddell*, for appellant.

I. The indictment is defective. It does not state to whom the liquor was sold; nor does it say to some person to the jurors unknown.

*Knott*, (attorney general,) for the State.

I. The name of the person to whom the liquor was sold need not be stated in the indictment. (Page v. State, 6 Mo. 205; State v. Ladd, 15 Mo. 430; State v. Miller, 24 Mo. 532.)

EWING, Judge, delivered the opinion of the court.

This was an indictment for selling liquor without license, and the question here is as to the sufficiency of the indictment. The objection is, that it omits to aver to whom the sale was made, or that it was made to some person or persons to the jurors unknown. This point was decided by this court in *The State v. Ladd*, 15 Mo. 432, and the omission to name any person in the indictment held to be immaterial. The offence consists in the sale of liquor without license in the prohibited quantity; and as there could be no sale without a purchaser, the name of the purchaser is in no sense descriptive of the offence, and need not, therefore, be stated.

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Neither is it necessary to aver the sale to be made to a person or persons to the jurors unknown, when no one is named; for if such an averment is made, and it is proved that the persons who purchased the liquor were known to the jury, this constitutes no variance, and the averment is mere surplusage. The doctrine of this case (*State v. Ladd*) has been repeatedly recognized by this court in other cases. (*Page v. State*, 6 Mo. 205; *State v. Miller*, 24 Mo. 532.) The judgment will be affirmed, the other judges concurring.

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THE STATE, Respondent, v. FOGERSON, Appellant.

1. An indictment, founded on the fifteenth section of the seventh article of the act concerning crimes and punishments (R. C. 1855, p. 620), which charges that the defendant did wilfully and unlawfully disturb the peace of a neighborhood "by then and there cursing and swearing, and by loud and abusive and indecent language," is sufficient.
2. To sustain the charge made in an indictment founded on that section it is not necessary to show that every person in the neighborhood was disturbed; nor would the testimony of individuals be admissible in behalf of defendant to show that they were in the neighborhood and they were not disturbed.

*Appeal from Laclede Circuit Court.*

The facts are set forth sufficiently in the opinion of the court.

———, for appellant.

*Knott*, (attorney general,) for the State.

I. The indictment is sufficient. The evidence offered by the defendant was clearly irrelevant. The instructions as a whole present the law of the case fairly before the jury.

EWING, Judge, delivered the opinion of the court.

The defendant was indicted, under the fifteenth section of the seventh article of the act concerning crimes and punishments, for disturbing the peace of a neighborhood. The

offence under the statute consists in wilfully disturbing the peace of any neighborhood, or of any family, by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, quarreling, challenging, or fighting, &c. The indictment charges that the defendant on, &c., at, &c., did then and there wilfully and unlawfully disturb the peace of a neighborhood, to-wit, the neighborhood and town of Lebanon, in said county, by then and there cursing and swearing, and by loud and abusive and indecent language, &c.

As a general rule it is sufficient to describe an offence created by statute in the words of the statute, and indeed it is necessary to do so where the offence may not be as clearly and intelligibly set forth in other language. But when the words used are in effect equivalent to those in the statute, this verbal strictness is relaxed, and the indictment will be held good. (1 Chitty C. L. 283.) It is sufficient if the indictment contain enough to inform the defendant and the court of the precise nature of the charge.

In the case at bar the defendant is charged with disturbing the peace of the neighborhood by loud and abusive and indecent language. The offence may be committed by loud and offensive conversation, or loud and indecent conversation. The terms are used disjunctively in the statute, and the offence is well described if the disturbance is alleged to have been committed either by loud and offensive, or loud and indecent, conversation. The word "language," however, is substituted by the pleader for the word "conversation." To this, I think, there is no objection, as the former is equivalent in import, if indeed it is not even more appropriate and expressive of the intent of the legislature and descriptive of the offence. It is safest, however, to follow the words which the law-maker has chosen to define the offence; and this general rule should not be relaxed, except where the nature of the offence, and all the particulars descriptive of it, are clearly set forth in the language employed in the indictment.

The first instruction given on the part of the State, unconnected with others given at the instance of the defendant,



is erroneous, because it does not direct the attention of the jury to a particular circumstance essential to an offence, namely, the disturbance of the peace of the neighborhood. It tells the jury that if they believe the defendant used indecent language, or loud and offensive language, in the town of Lebanon, and that such language was wilfully used, they must find defendant guilty. These facts may have been found by the jury, and yet no offence have been committed, because no disturbance may have been caused by it. This instruction then, in this respect, was improper. The court, however, gave an instruction embracing all the facts and circumstances constituting the offence, which must have prevented the jury from being misled or from misconceiving the law of the case as given by the court. Upon the whole, therefore, we think there was no error on this point.

It is also objected that the court erred in excluding the testimony of three persons introduced by defendant to prove that they resided on the public square, and were present at the time of the alleged disturbance, and that neither they nor their families were disturbed. This evidence, we think, was properly excluded. It had no tendency to disprove the charge in the indictment, namely, that the peace of the neighborhood was disturbed by the defendant's conduct, and this was the matter of inquiry—not whether one or two individuals considered themselves disturbed. That they were not, or may not have been, disturbed by the conduct of the defendant was not necessarily inconsistent with the truth of the charge against him, that the peace of the neighborhood was disturbed. To sustain the charge it is not necessary to prove that every individual composing the community or neighborhood was disturbed, nor could the charge be disproved by the kind of negative evidence offered with respect to two or three persons. The judgment will be affirmed, the other judges concurring.

THE STATE, Defendant in Error, v. BIDDLE, Plaintiff in Error.

1. Judgment affirmed.

*Error to Webster Circuit Court.*

———, for plaintiff in error.

*Knott*, (attorney general,) for the State.

NAPTON, Judge, delivered the opinion of the court.

The point presented by the record in this case is the propriety of the instructions which the court gave upon the trial. Upon examination, we have not found any substantial objections to them. Some of them are abstractions and might be questioned, if they had tended to prejudice the defendant; but the instructions applicable to the facts as they were before the jury were correct, and the others were at least harmless.

Judgment affirmed; the other judges concurring.



THE STATE, Respondent, v. STEWART, Appellant.

1. An indictment for a felonious assault with intent to kill is not rendered defective by any omission to charge therein that the offence was committed "on purpose and of malice aforethought."
2. In an indictment for a felonious assault with intent to kill, the question of the intent of the accused is a question of fact for the jury; it may mislead them to instruct that the "law presumes that every man intends the necessary and probable consequences of his acts."

*Appeal from Laclede Circuit Court.*

This was an indictment for a felonious assault with intent to kill. The defendant moved the court to quash the indictment because it was not alleged that the offence was committed on purpose and of malice aforethought. The motion

was overruled. At the trial, the court, among other instructions, gave the following: "The intention is incapable of proof; it can only be implied from overt acts; and the law presumes that every man intends the natural, necessary, and probable consequences of his acts; and if the jury believe from the evidence that the defendant assaulted Lennox with a deadly weapon, from which death might have ensued as a necessary, natural and probable consequence, they must find defendant guilty."

*Orr*, for appellant.

I. The court erred in overruling the motion to quash. The assault was not charged to have been made on purpose and of malice aforethought. There was no evidence of an assault with intent to kill. The walking-stick was not a deadly weapon. The instructions given were erroneous.

*Knott*, (attorney general,) for the State.

I. The indictment is good under the thirty-eighth section of the second article of the act concerning crimes and punishments. (R. C. 1855, p. 567; 9 Mo. 862; 19 Mo. 678; 22 Mo. 462.) Whether all the instructions are strictly correct or not, they were not calculated to mislead the jury. Taken altogether, they submitted the case fairly to the jury.

NAPTON, Judge, delivered the opinion of the court.

The indictment in this case is deemed sufficient under the thirty-eighth section of chapter fifty of the act concerning crimes and punishments.

We are not satisfied, however, that the instructions presented the law in such a shape to the jury as to enable them to understand their duty. None of the instructions, which are given, made any exceptions in favor of justifiable assaults; and this omission may have been right enough and produced no harm, if, in truth, there was no evidence in the case which rendered it necessary to present such a hypothesis to the jury.

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But the instruction in reference to the intent of the defendant was calculated to mislead. The intent of the defendant in making the assault was a question of fact for the jury. The law raises no presumption about it, and it was error for the court to tell the jury that "the law presumes that every man intends the natural, necessary, and probable consequence of his acts."

With the concurrence of the other judges, the judgment is reversed, and cause remanded.



KINCHELOE, Respondent, v. GORMAN'S ADMINISTRATORS, Appellants.

1. After an administrator has appeared in a probate court and put in a defence to the allowance of a demand against the estate of his intestate, and has obtained judgment in the probate court, and the cause has been taken to the circuit court by appeal, it is too late for the administrator to object that he did not receive a notice of the demand as provided by section sixteen of article four of the administration act. (R. C. 1855, p. 155.)
2. The affidavit required by the twelfth section of article four of the administration act (R. C. 1855, p. 154) may be made *ore tenus*; it is not necessarily noted on the record.

*Appeal from Wright Circuit Court.*

This was an application to the probate court of Wright county for the allowance of a demand against the estate of John M. Gorman, deceased. From the record of the proceedings of the probate court it appears that the plaintiff and the administrators appeared and submitted the cause to the court, and that judgment was rendered for the defendants. An appeal was taken to the circuit court. On the trial anew in the circuit court, the plaintiff offered in evidence the record of the proceedings of the probate court. The court admitted the record against the objections of the defendants. The plaintiff on the trial in the circuit court did not file his affidavit or make oath in open court to his account. The

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remaining facts sufficiently appear below in the opinion of the court.

*H. C. Ewing*, for appellant.

I. The court erred in admitting the record. It does not show that defendants had notice as required, nor that they waived notice in open court. (1 R. C. 1855, p. 155, § 15, 16, 17; 12 M. 598.) It does not show that the plaintiff filed an affidavit or made oath in open court as required. (1 R. C. 1855, p. 154, § 12.) The court erred in giving improper instructions.

*Knott & Hough*, for respondent.

I. The court properly admitted the record.

NAPTON, Judge, delivered the opinion of the court.

The objections, which were taken to the record of the proceedings in the county court, we think, were properly overruled. It is true that the record does not show that the administrator was duly notified according to the requirements of the statute; nor does it appear that he made a formal waiver of notice in open court; but the record shows that he was present at the trial, and succeeded in getting a judgment in his favor.

In relation to the affidavit, which the law requires from a claimant before the county court is authorized to allow a claim, there is nothing in the record to show whether it was made or not. But there was no point made on this at the trial. If there had been, the affidavit might have been supplied. Besides, it has been held that this affidavit may be taken *ore tenus*, and is not necessarily noted on the record. No objection to the instructions being insisted on here, the judgment will be affirmed. The other judges concur.

## PEARCE, Respondent, v. McINTYRE, Appellant.

1. Motions to strike out parts of pleadings should contain the parts sought to be stricken out, or those parts should be so designated that they can be readily ascertained.
2. It is not essential to an arbitration that it should adjust all matters in difference between the parties; an award determining a single one of several matters in difference may be final and conclusive so far as it goes.

*Appeal from Holt Circuit Court.*

This was an action to recover the value of carpentry work alleged to have been done by plaintiff for defendant. The plaintiff set forth in his petition a submission by plaintiff and defendant of the value of the said work to arbitration and an award made under said submission by which, as was alleged, it was adjudged and awarded that the sum of \$801.79 was "due to plaintiff by said defendant for work and labor done at the special instance and request of said defendant." Plaintiff also claimed in his petition the value of painting and glazing that had not been included in the award. The defendant in his answer denied that the award was as alleged in the petition; denied any indebtedness for painting and glazing, and set up matters by way of counter-claim and offset. A portion of the answer was stricken out on motion of the plaintiff.

At the trial the submission was read in evidence. It submitted to the arbitrators to determine the "worth" of the carpentry work "according to the prices of the country." Plaintiff offered in evidence the award, and it was admitted against the objections of defendant. This award, after affixing values to the various items of work, closed as follows: "Making the sum of \$804.75, which we find for Nathan Pearce and against George McIntyre." Evidence was also adduced tending to prove the charge for painting and glazing. The defendant introduced testimony tending to prove the offset or counter-claim set up in the answer. The court gave the following instruction at the instance of the plaintiff:



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"The award read in evidence is sufficient to prove the work done for defendant by plaintiff and the value thereof, with interest, unless they believe from the evidence that some part thereof has been paid, or unless defendant has established his counter-claim or some part thereof; and if so, they will deduct the amount so paid and the counter-claim so proved, and give a verdict for the balance, if there should be such balance." The court refused the following instruction asked by defendant: "The jury will exclude from their consideration the paper read in evidence purporting to be an award, and signed by Thomas D. Walter and Franklin Hart as arbitrators." Instructions asked by defendant with respect to his counter-claim and offset were given.

*Crow & Loan*, for appellant.

I. The court erred in admitting the award. There was a variance between it and the petition. There was no authority given to the arbitrators to find any indebtedness either way. It does not possess the requisites of an award in that it does not purport to determine finally any matters in difference between the parties. (1 Bac. Abr. 225, 222; 15 Mo. 540; 10 Mo. 308.) It is not based upon any submission and was made without authority. The instruction asked should have been given. The motion to strike out should have been overruled. The instructions given should have been refused. One case is stated in the petition and a different one is assumed in the instruction. (18 Mo. 403.)

*Woodson*, for respondent.

I. The petition is good. The award is sufficient evidence of the value of the work done. The law of the case was fairly put to the jury. The counter-claim of defendant was considered and allowed. The defendant was not aggrieved. (7 Mo. 497; 15 Mo. 400; 15 Mo. 143; 1 Mo. 163, 313; 588, 746; 3 Mo. 472; 8 Mo. 702, 224; 9 Mo. 303; 10 Mo. 62.) The parts of the answer were properly stricken out. The defendant therein attempted to put in issue the very matters settled by the award. The award was final.

Scott, Judge, delivered the opinion of the court.

It must be obvious that the action of the inferior courts on motions to strike out parts of the pleadings in a cause can not be reviewed in this court, unless such motions designate the portions to be stricken out in some other mode than by reference to the pages and lines of the original record, as these never correspond with the pages and lines of the transcript filed here, so that it is impossible to ascertain the parts of the pleadings to which the motion refers. Motions to strike out parts of the pleadings should contain the parts sought to be stricken out, or they should be designated in a manner that this court can readily ascertain them. The record not showing what parts of the answer were stricken out, we can not review the action of the court below on that subject.

We can see no error in the court in permitting the award to be read in evidence. There was no variance between the award and the petition. The arbitrators were authorized to fix the prices of the work done by the plaintiff for the defendant. This was done, and their adding that the sum found was for the plaintiff against the defendant was mere surplusage, and did not affect any right of the defendant. No one can understand that the award prevents any defence on his part consistent with the fact that the work was worth the sum at which it was appraised. The defendant was not precluded by the award from proving any set-off or counterclaim he might have had against the plaintiff. Indeed he was allowed, and did do this. The award did not pretend to go farther than the arbitrators were authorized. It was perfectly consistent with the idea that there was nothing due to the plaintiff from the defendant. It is competent to parties to make a single matter the subject of an arbitration. It is not essential to constitute an arbitration that it should adjust all matters in difference between the parties. A single matter is frequently a subject of reference, in order that the

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award may enable the parties themselves to adjust all their dealings.

For reasons given, there was no error in refusing the defendant's first instruction. The third instruction asked by the defendant was properly refused because the plaintiff's replication showed that there was no foundation for it.

The other judges concurring, the judgment is affirmed.

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GERDING, Respondent, v. WALTER, Appellant.

1. The law does not presume from the simple fact of one man's handing over money to another, that the transaction is *prima facie* a loan.
2. If the material fact upon which a cause of action is based be put in issue by the answer of the defendant, the plaintiff must adduce evidence in its support.

*Appeal from Buchanan Court of Common Pleas.*

This was an action to recover the sum of one thousand dollars alleged to have been loaned to the defendant at divers times in the month of August, 1858. The defendant in his answer proceeded as follows: "Defendant denies, except as hereinafter stated, that he is justly indebted in the sum of one thousand dollars for money lent by plaintiff to defendant at various times. Defendant denies, except as hereinafter stated, that he is indebted to plaintiff for one hundred and twenty-five dollars on the 12th of August, 1858, or for one hundred and twenty-five dollars on the 13th of August, 1858, &c., [specifying the sums charged in the petition.] Defendant denies that each and every one of said sums of money is now due and owing plaintiff, or that any of the same is now due and owing plaintiff. Defendant denies that plaintiff is entitled to any interest for money loaned, or to any judgment against him. Defendant states the fact to be that he married the daughter of plaintiff; that about August last (1858) he commenced investing a large sum of money

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in a brewery building in St. Joseph; that plaintiff, having sold his house and lot in Illinois, moved with his family to St. Joseph sometime in August last; that he (plaintiff) offered to let defendant have a thousand dollars to assist defendant in erecting said brewery, provided defendant in consideration would board plaintiff and his family and pay their expenses and furnish them with a home as long as they desired; that defendant assented to this proposition of plaintiff, and plaintiff advanced defendant at different times one thousand dollars, and with his family came and lived with defendant, who furnished them every thing suitable and necessary; that he advanced various sums to plaintiff; that after staying with defendant about six weeks plaintiff suddenly declared that he was dissatisfied with the country and moved back to Illinois; that plaintiff has ever been and still is able and willing to perform his whole contract; that in consequence of getting said money on said terms plaintiff greatly extended his plans in building and extending said brewery improvements, and "if he (plaintiff) is allowed to violate his contract and recover back said money in this suit, plaintiff is damaged thereby in the sum of three hundred dollars, which said damages he is entitled to recoup. Defendant, however, avers and claims that plaintiff is not entitled to recover any judgment in this case," &c.

At the trial there was no evidence adduced. The court, among other instructions, gave the following: "1. The defendant in his answer admits his indebtedness to plaintiff to be one thousand dollars, and the jury will so find in their verdict."

*Bassett & Loan*, for appellant.

I. The first instruction given should have been refused. The answer denies in the most direct and emphatic terms any loan. (See *Westlake v. Moore*, 19 Mo. 556.)

*Vories & Vories*, for respondent.

I. The defendant's answer admits that the sum of one thousand dollars was advanced to him at various times, but

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allege that it was advanced under a special contract which defendant must prove or plaintiff ought to recover. The answer does not deny the items as stated. It simply denies generally that defendant was indebted at the time of filing the answer. Each allegation should be specifically denied. (Engle v. Bates, 19 Mo. 543.) The case of Westlake v. Moore is not in point.

NAPTON, Judge, delivered the opinion of the court.

The instructions given by the court in this case seem to assume that the natural or legal presumption arising from the simple fact of one man handing over money to another is, *prima facie*, a loan. We do not know of any authority or principle to justify this conclusion. It would seem to be more reasonable to infer, from this simple transaction unexplained, that the money is to pay a debt, or is intended as a gift. Where a loan is made, some proof of the transaction is usually preserved.

The plaintiff here averred that the defendant was indebted to him in the sum of one thousand dollars for money lent. The defendant answers that he is not indebted to the plaintiff in the sum of one thousand dollars for money lent. The plaintiff avers a *loan*. The defendant denies it. It is true that the defendant subsequently proceeds to state a particular history of the facts, according to his understanding of them, which constitute the basis of the plaintiff's supposed claim and of the defendant's supposed defence; but this statement is merely an extended and detailed denial of the alleged loan. If the facts are stated correctly by the defendant, it is clear that no money was loaned to him by the plaintiff, but that the thousand dollars was given to him upon sufficient consideration, and that the plaintiff has no claim to demand it back.

The answer was treated by the circuit court as an admission of a loan and an attempt to set up a counter-claim; and therefore, in the absence of any proof on either side, the court directed the jury to find for the plaintiff the sum

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claimed with interest. We do not so understand the pleadings. We understand the answer to be a direct and emphatic denial of any loan of one thousand dollars, or any other sum; and of course, upon the conceded rules of pleading, the burden of proof is on the plaintiff to make out at least a *prima facie* case.

Judgment reversed and cause remanded.

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ATTEBERRY, Defendant in Error, v. POWELL, Plaintiff in Error.

1. Though an answer to a petition may contain different defences separately stated, they must be consistent defences; in an action for slanderous words, the defendant can not be allowed in the same answer to deny and also to justify the speaking of the words charged. (R. C. 1855, p. 1233, § 14.)
2. An answer in an action of slander justifying the speaking must confess the speaking; an answer merely stating that the words spoken are true is not sufficient as a justification; it should state the facts constituting the crime or offence imputed so that an issue of either law or fact may be found.
3. Where the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, or where they fail in any other respect to conform to the requirements of the law, the court may require the pleading to be made definite and certain, and otherwise to conform to the law, by amendment. (R. C. 1855, p. 1236, § 31.)
4. Where the petition, in an action of slander for charging the plaintiff with perjury, is defective, in that it does not state how the alleged perjury was committed, the defect will be aided by a plea of justification setting forth the circumstances under which the alleged false oath was taken.
5. In an action for speaking slanderous words, it is calculated to mislead the jury to refer it to them to determine whether the defendant "in substance" spoke or published the words charged, without explaining the meaning that the law would attach to that expression in connection with the proof of the slander charged.

*Error to Dallas Circuit Court.*

This was an action for the speaking of slanderous words. The petition contains two counts. In the first count it was charged that the defendant on, &c., at, &c., "in a certain



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conversation with one Absalom Austin, and in the presence and hearing of divers other good citizens of, &c., in a certain conversation with said Absalom Austin of and concerning the said plaintiff George W. Atteberry, and of and concerning the character of said plaintiff for honesty and integrity, and of and concerning an affidavit and oath which plaintiff before that time had made and given before the county court of said county at its May term, 1857, in the matter of William F. Tinsley's right to enter or purchase certain public land, to-wit, forty acres of land in said county, maliciously spoke the following malicious, false and slanderous words of and concerning the character of plaintiff, and of and concerning the aforesaid oath, to-wit, 'they,' meaning plaintiff Atteberry and Tinsley, 'have got my board down; they have worked me out of a piece of land that I can prove that I claimed by twenty persons; I don't know that I can prove any claim on that particular piece that Tinsley got without getting some person to swear as they did for Tinsley;' thereupon being asked who swore for him, meaning Tinsley, he (defendant) said, 'Atteberry,' meaning the oath which plaintiff had as aforesaid made of and concerning the said entry or purchase aforesaid, and meaning thereby then and there, and was so understood by him the said Austin and those present, that plaintiff had sworn a lie, and had been guilty of the crime of perjury in the aforesaid oath concerning said entry or right of purchase proved up as aforesaid by him, the said plaintiff; by reason of which," &c.

In the second count it was charged that the defendant "on," &c., in the presence and hearing of Wesley Austin, and divers other citizens of Dallas county, in a conversation with said Wesley Austin of and concerning plaintiff, and of and concerning the oath aforesaid, which he, the said plaintiff, had made before the county court of said county of Dallas (said oath being made and taken by said court under the authority of law in deciding upon the right of said Tinsley to enter or purchase forty acres of land in said county), did speak, utter and publish the following false and slander-

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ous words: 'they have taken a piece of my land by false swearing;' he (defendant) thereby meaning that plaintiff, in making said oath, had sworn false, and had been guilty of the crime of perjury; and he then, said defendant, was thereby then and there so understood to mean that plaintiff had been guilty of the crime of perjury by the said Wesley Austin and those persons present; wherefore and by reason of which," &c.

A demurrer to this petition having been overruled, the defendant filed the following answer: "Defendant comes and for answer to the first count in said petition says, he did not speak or publish the supposed false and slanderous words of or concerning plaintiff, or either of them, as charged in said first count of said petition; nor did he mean by any thing he said of or concerning plaintiff that he had been guilty of the crime of perjury. Defendant further answers and says that he did not speak or publish the false and slanderous words of and concerning the plaintiff in the second count of said petition specified as therein plaintiff has alleged, or any or either of them; nor did he mean by any thing he did say that plaintiff had been guilty of perjury.

"Defendant further answers and says plaintiff ought not to have or maintain said action against him, because he says that at the time in said petition mentioned when the plaintiff made the supposed oath, affidavit before said county court of Dallas county, he, the said plaintiff, then and there made oath and stated before said county court that no other person except said Tinsley had any claim on said forty acres of land mentioned in said petition, whereas, in truth and in fact, defendant then and long before that time had a claim on said forty acres of land, whereof plaintiff was then well aware, which is the same affidavit and oath mentioned in both counts of said petition, and not other or different. And defendant says that plaintiff did swear and testify in said affidavit and oath falsely, knowingly, wilfully and corruptly, in manner aforesaid; and so defendant says it is true, as stated in the first count of said petition, that plaintiff had sworn falsely in

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manner aforesaid; and that it is true, as stated in said second count in said petition, that plaintiff had sworn falsely in manner aforesaid; all of which he is ready to verify."

It is deemed unnecessary to set forth the facts in evidence.

*Hendrick, Johnson & Ballou*, for plaintiff in error.

I. The petition is insufficient. The demurrer should have been sustained. It does not show that the oath in respect to which the words were spoken was taken in a case wherein perjury could be committed. The petition does not show that the oath was taken before a competent tribunal. The words spoken are not actionable. (See Sess. Acts, 1855, p. 479.) The evidence in respect to swamp lands was required to be taken before the clerk in vacation, and not before the court. If taken before the court it could not be perjury. The county court was not the tribunal to hear the evidence of Tinsley's right to enter the land. (See *Vaughn v. Havens*, 8 Johns. 109; 2 Johns. 10.) The evidence offered to sustain the plea of justification ought to have been admitted. The instructions asked by defendant should have been given. The instructions given were erroneous.

*Freeman*, for defendant in error.

I. The demurrer was properly overruled. The court committed no error in giving or refusing instructions. The county court had power under the act of 1855 to hear testimony on applications to enter swamp lands.

SCOTT, Judge, delivered the opinion of the court.

The object of the present practice act was to introduce truth and simplicity in pleadings. The act requires that the pleadings should be verified by affidavit. This requirement must necessarily exclude inconsistent answers. As an answer in justification of a charge for slander must admit the speaking of the slanderous words, the defendant can not deny and justify the speaking of words at the same time. To be satisfied of this, it would seem only to be necessary to place

the two answers in juxtaposition. Under the old system the speaking of the slanderous words might be denied in one plea and justified in another, but that can not now be permitted. What were consistent or inconsistent pleas under the old practice, where the pleadings were not required to be verified, is a very different question from what are consistent or inconsistent answers under the practice now prevailing, where all the pleadings are required to be sworn to. The statute allows different consistent defences to be separately stated in the same answer. (R. C. 1855, art. 6, § 14.) In New York, whence our practice act comes, there is a diversity of opinion in the courts on this question. The weight of reason is with those who hold that the answers are inconsistent; and it is observable that those who maintain that the two answers may be made, are silent as to the requirement of a verification of the pleadings. The general issue is now abolished, and a defendant under it can not show that the words were not maliciously spoken, or did not amount to slander. But where the words are of such a character, he may in such a case state the circumstances under which they were spoken in order to show the want of malice, and in that way may defend the action. Mitigating circumstances serve only to reduce the damages; they can not therefore constitute a defence to the action; and whenever they are set up it must be in connection with an answer to the action, and the pleader should state that they are in mitigation of damages, as otherwise, not amounting to an answer, the court would be warranted in striking them out, as not knowing for what purpose they were intended.

The parties can not expect to obtain an advantage by evasive pleading. If the pleading is insufficient, it ought to be disposed of before going into trial. A defendant can not put in an answer insufficient as a justification, and expect to treat it as such when it suits his purpose, and then be permitted to deny it when it is his interest to do so. An answer merely stating that the words spoken are true is insufficient as a justification; it should state the facts which go to con-

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stitute the crime or offence imputed, so that an issue of either law or fact may be framed. An answer justifying the speaking of the words must confess the speaking. (*Voorhies' Prac.* 206.) Indeed the failure or neglect of the inferior courts to comply with the plain requirements of the statute renders it almost impossible to do any thing with the practice act now in force. Each party moves on confident of success, and it is not until his case is lost that he awakes to the great irregularities of the pleadings. The law requires that, when the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, and when they fail in any other respect to conform to the requirements of the law, the court may require the pleading to be made certain and definite and otherwise to conform to the law by amendment. (*R. C.* 1855, p. 12, 36, art. 6, § 31.)

This case seems to fall within the principle of those in which it has been held that in an action for slander, where the declaration averred that the plaintiff was foresworn without showing how, it was determined that this defect was aided by a plea of justification which alleged that the plaintiff had taken a false oath at the sessions. (*Drake v. Cordery*, *Cro. Cas.* 288; *Chitty's Plead.* 671.) This principle, it seems, is still applicable under the present practice. (*Ayres v. Covill*, 18 *Barb.* 260.)

Errors were committed pending the trial, which will make it necessary to reverse this judgment. In whatever light the pleadings are viewed the difficulty presents itself. If the case is considered as standing on the answer in justification, then all evidence offered in proof of the answer was excluded by the court, an error that can not be surmounted. We may not understand the bill of exceptions, for, without any hesitancy, it may be pronounced one of the worst prepared papers that was ever presented; and if those obtaining judgments will suffer the judge to sign such papers, they must take the consequences. The bill of exceptions, as it appears to us, does furnish evidence conducing to show the truth of



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the slander. If we read it correctly, it seems that the land entered by Tinsley did not corner with the lands he held by preëmption; that the one was three quarters of a mile from the other. Why did the court set aside the order allowing Tinsley to enter the land? There was evidence that Atteberry knew that another claimed the land.

In the case of *Berry v. Dryden*, 7 Mo. 324, the court said "the slander proved must substantially correspond with that charged in the declaration." In the first instruction given by the court at the instance of the plaintiff, the jury is told that "if the defendant spoke and published the slanderous words mentioned in the first count in the petition, or spoke or published the same *in substance*, intending thereby," &c. These words "in substance" were objectionable by themselves without further explanation. The language this or any other court may use in expressing its opinions is not always appropriate in an instruction to the jury. Opinions are usually addressed to and intended for the scientific. If the court saw proper to use the words "substantially" or "in substance" in speaking of the proof of the slander charged, it should have gone further, and stated, as was done in *Berry v. Dryden*, what idea the law attached to those words in connection with that subject. There is no phrase more likely to mislead a jury than to tell them that if the slanderous words are "in substance" proved the action is sustained. The ordinary acceptation of the words is widely variant from the sense in which they are used by the courts in speaking of the proof of the slanderous words charged in a petition.

Reversed and remanded.

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BURROW, Respondent, v. POUND *et al.*, Appellants.

1. A. agreed with B. that if the latter would proceed with his team to a place at a distance he would furnish him with 3,000 pounds of "back loading" from that place; B. did go with his team to the designated place and A. furnished him with only a portion of the freight agreed upon. *Held*, that B. was entitled to recover for the whole amount agreed upon.



*Appeal from Newton Circuit Court.*

The facts sufficiently appear in the opinion of the court.  
*Edwards & Ewing*, for appellants.

I. The court erred in refusing the instructions asked.

EWING, Judge, delivered the opinion of the court.

This was a suit before a justice of the peace for money alleged to be due on a contract by which the plaintiff agreed with defendants to transport from Jefferson city to Granby three thousand pounds of goods, at two dollars per hundred.

The statement filed with the justice alleges that defendants agreed with plaintiff that, if he would proceed to Jefferson city with his team, defendants would furnish him with three thousand pounds of back loading from there to Granby, in Newton county, at the rate of two dollars per hundred pounds; that in pursuance of said agreement plaintiff went to Jefferson and demanded from Cloney, Crawford & Co., the agents of defendants, the goods, but that defendants failed to comply with their agreement, whereby they were damaged sixty dollars. Plaintiff had judgment for the sum claimed, from which defendants appealed to the circuit court, where, on a trial by a jury, plaintiff had judgment again for fifty-six dollars.

There was but one witness examined, who proved the agreement as set forth in the statement filed, and that the plaintiff proceeded to Jefferson with his wagon and team, and obtained only eighteen hundred pounds of goods of defendants—that being all they had at that place; that plaintiff got two hundred pounds additional, the goods of another firm at Granby, and returned with a load of two instead of three thousand pounds. The defendants asked two instructions, the first of which is in effect that the plaintiff ought not to recover for the one thousand pounds which he failed to get; and the other is “that unless the jury believe from the evidence that plaintiff tried to get other hauling and

failed, they ought to find for the defendants." The refusal of these instructions is assigned for error.

Both instructions are obviously erroneous. The agreement was to transport a given amount of freight at a stipulated price per hundred. The quantity was as distinctly contracted for as the price for which it was to be hauled, and the assurance of obtaining that much was the main inducement, as may be supposed, to the undertaking of transporting goods such a distance. The time and expense of plaintiff were the same whether he got half or the whole of the goods stipulated for; and as he was ready to perform, and did perform, the contract on his part, so far as it was possible, he is entitled to full freight.

The second instruction was properly refused because it declares the plaintiff can not recover even *pro rata* freight, unless he made efforts to obtain other goods and failed; that he is entitled to no compensation for the goods he actually hauled for the defendants by reason of failing to get others to make up the quantity which the defendants bound themselves to furnish.

The judgment is affirmed; the other judges concurring.



MASSEY, Plaintiff in Error, v. TINGLE, Defendant in Error.

1. When the statute of limitations begins to run against an action to adjust and settle the accounts of a partnership must depend upon the circumstances of the case; there is no rule of law that it begins to run from the date of the dissolution of the partnership.
2. It is the province of the jury to pass upon questions of fact, not matters of law.

*Error to Jasper Circuit Court.*

This was an action to adjust and settle the accounts of a partnership that had formerly existed between plaintiff and defendant. This suit was commenced April 4, 1853. It alleged a partnership between plaintiff commencing in 1837

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Massey v. Tingle.

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and ending by a dissolution by mutual consent on the 5th of March, 1841. Plaintiff alleges that he furnished more capital than defendant; that the excess was in the nature of a loan to defendant, to be accounted for on final settlement; that there has been no final settlement; that the debts of the partnership have all been paid. Plaintiff claims to have an execution against the partners; for the half of which with the excess of capital he prays judgment. The defendant in his answer puts in issue the allegations of the petition with respect to the advancements of capital by plaintiff; alleges that he, defendant, furnished capital not credited to him in plaintiff's petition; that for several years after the dissolution plaintiff received rent of various buildings belonging to the firm. He also set up the statute of limitations.

At the trial the following issue was made under the direction of the court and ordered to be submitted to the jury: "Did plaintiff's right of action accrue within five years next before the commencement of this suit?" To the ordering of this issue to be tried by the jury plaintiff excepted. Certain testimony offered by plaintiff being ruled out, he took a nonsuit, with leave, &c.

———, for plaintiff in error. \*

I. The court erred in submitting a question of law to the jury. The issue upon the statute of limitations, as made up, submits a question of law, not one of fact. The court erred in excluding testimony.

SCOTT, Judge, delivered the opinion of the court.

This judgment must be reversed because the court below referred as an issue of fact to the jury a matter of law. We know no principle which declares that the statute of limitations begins to run against an action to adjust and settle partnership accounts from the time of its dissolution. When the account, or an item in the account, is barred, must be deter-

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\* The brief on file in this cause was filed by Judge Ewing at a former term of the court.—[REP.]

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Riley v. Minor.

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mined from the facts in relation to it. The application of the statute must be governed by circumstances. Cases may be stated in which an account may be barred in five years; others may be stated in which an account would not be barred in a much longer time. When the facts of this case are all ascertained, it will be the province of the court to declare whether the action for an adjustment of the concerns of this firm is barred. There is nothing in the record as it now stands which enables this court to pronounce that this action is barred. Judge Napton concurring, the judgment is reversed and the cause remanded; Ewing, Judge, not sitting, having been of counsel.

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## RILEY, Respondent, v. MINOR, Appellant.

1. The authority of an agent to make an executory contract for the sale of land need not be in writing.

*Appeal from Buchanan Court of Common Pleas.*

This was an action for the possession of land. The defendant claims to be the owner of the land, and justly entitled to the possession thereof by virtue of a purchase from plaintiff through one Cleek, his agent. It is alleged that plaintiff gave Cleek a power of attorney, which it was erroneously supposed gave him authority to convey land, it being the verbal understanding of the parties that he was authorized to sell and convey plaintiff's lands.

*Hall, Vories & Vories*, for appellant.

I. The court erred in excluding the bond given by Cleek, the agent of plaintiff. Plaintiff gave Cleek parol authority to sell the land in controversy. The defendant paid part of the purchase money, and made valuable improvements. It would be a fraud upon his rights to turn him out.

*Woodson & Loan*, for respondent.

I. The court properly excluded the bond of Cleek.

EWING, Judge, delivered the opinion of the court.

The question presented by the bill of exceptions is the refusal of the court to permit the instrument of writing executed by Cleek to be read in evidence. It is not pretended by the appellant's counsel that the power of attorney from the respondent to Jacob Cleek read in evidence contains any semblance of authority to sell real estate; and unless the evidence of the witness Cleek discloses a verbal authority for this purpose, the instrument was properly excluded. It is well settled that to make a valid executory contract for the sale of lands it is not necessary that the agent's authority should be in writing; and when the question arises as to the authority of the person claiming to be an agent to sign the contract, it is sufficient to establish the fact by parol that he was thereto lawfully authorized.

Turning to the testimony of Cleek, we look in vain for any evidence of an agency to sell the land of the respondent, or to make or sign any contract respecting it. On the contrary, it is very clear, not only from the statements of the respondent as detailed by the witness, but from all the circumstances in evidence, that no authority or agency could have been contemplated except that conferred by the power of attorney given to Cleek. It would seem strange that Riley, the respondent, should have executed a formal power of attorney for the purpose of collecting debts or settling some accounts, and have given at the same time a mere verbal power to sell his lands. But this is put at rest by the witness himself, who states that the writing contained all the power or authority he had for selling the land; and that when he made the sale to the appellant he exhibited the power of attorney to him, and told him *that* was his authority to sell. It seems that both the appellant and Cleek acted on the power of attorney, and that it was looked to alone at the time of the negotiation and sale as the authority to make it. It is evident that Cleek did not assume to act upon a parol authority in the transaction, and that he did not deem himself clothed with

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Blanchard v. Baker.

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authority for that purpose, except by virtue of the power of attorney. So also Minor seems to have viewed the matter, until he discovered that it was insufficient for that object.

The judgment is affirmed; the other judges concurring.

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BLANCHARD *et al.*, Respondents, v. BAKER *et al.*, Appellants.

1. A. conveyed certain real estate to B. in trust to secure a debt due C. Afterwards D. obtained a judgment against A. and the interest of A. in said real estate was levied on and sold under the judgment, and D. became the purchaser. Previous to this purchase the trust debt had been satisfied. The trustee (B.) afterwards sold said real estate under the deed of trust and C. became the purchaser. *Held*, that D. was entitled to a decree of title against C.
2. Under executions issued upon judgments of the Weston court of common pleas, the marshal of the city of Weston may levy upon and sell real estate. He may make such sale in the city of Weston, where the court is held. (Sess. Acts, 1851, p. 203.)

*Appeal from Buchanan Circuit Court.*

The following is the finding of the facts by the court:  
“Now at this day this cause came on to be heard by the court on the pleadings, exhibits and proofs, and the court, being sufficiently advised, doth find that the debt due by the McDonalds and Adams to Robert Campbell, one of the defendants, to secure which the deed of trust of Thomas D. S. McDonald and wife to Elijah Cody, Alfred H. Foster and John T. Baker prayed to be set aside was executed, was satisfied by Adams before the sale of property in said deed mentioned was made by the trustees, at which sale E. W. Railey became the purchaser, and not complying with the sale, Robert Campbell, the defendant, was substituted to the right of said Railey under such purchase. The court further finds that the plaintiffs, after said debt was satisfied, became the purchasers at marshal's sale under execution from the Weston court of common pleas, and have obtained a deed to said property from the marshal of said court. It is therefore ad-



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judged, ordered and decreed that the deed of trust of said McDonald and wife to said Cody and others as trustees be cancelled and set aside, and that the deeds made by said trustees to E. W. Railey and by said Railey to Campbell be also set aside, and that the title to the lots in said deed of trust mentioned, to-wit, lot No. 13 and part of lot No. 10, in block No. 52, in the town of Weston, county of \_\_\_\_\_, state of Missouri, be vested in the plaintiffs; to have and to hold the same against the said defendants herein; and that the plaintiffs recover possession of said property, and their costs in this suit expended, for which possession and costs the plaintiffs may have execution," &c.

*Hall & Loan*, for appellants.

I. The finding of the facts by the court is defective and insufficient. (17 Mo. 553; 21 Mo. 140; 19 Mo. 123.) There are only three facts found—that the debt of \$3,510 due to Campbell was *satisfied* prior to the sale by the trustees under the deed of trust—that the plaintiffs, after the debt was satisfied, became the purchasers of the property at marshal's sale under execution from the Weston court of common pleas—that they have obtained a deed therefor from the marshal of said court. These are not the facts put in issue by the pleadings. The petition substantially charges that plaintiffs acquired the title of the McDonalds to the land mentioned in the petition. This fact the court failed to find; it is therefore to be considered as negatived. (Bates v. Bower, 17 Mo. 553.) There is also a failure to find the facts, the judgments, levies and sale, &c., upon which this ultimate fact rests. It says the debt was "satisfied." The question of payment is not touched. The facts showing a satisfaction are not found. (19 Mo. 123; 21 Mo. 140; 18 Mo. 110.) The court failed to declare the law upon the facts found. (17 Mo. 533; 15 Mo. 402; 22 Mo. 577; 28 Mo. 486.) Upon the facts found the judgment should have been for the defendants. The deed of the marshal was void. There was no law authorizing him to make such deed. The sale was made

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in the town of Weston, when by law it should have been made at the court-house at the county seat of Platte county. It was not made whilst the circuit court was in session as required by law. (18 Mo. 580.) The court erred in admitting the deed in evidence. (Sess. Acts, 1851, p. 203.)

*Ryland & Son* and *Burnes*, for respondents.

I. The finding supports the judgment. (17 Mo. 158, 550; 19 Mo. 325.) If the court failed to find a material fact, the defendants should have moved for a review. The court found the main fact, the payment to Campbell of the debt due him. The marshal's deed was properly received. (4 Monr. 319; 2 Monr. 202; 3 Mon. 339.) The Weston court has jurisdiction coextensive in all civil cases with the circuit court within the territory over which its jurisdiction extends.

EWING, Judge, delivered the opinion of the court.

This action was commenced under the practice act of 1849, and was tried by the court. The facts were found by the court, and judgment entered upon the finding; but there was no motion for a review in the court below. The only question therefore for our consideration is whether the finding supports the judgment.

The respondents, plaintiffs below, were judgment creditors of D. & T. D. S. McDonald, and in 1854 obtained judgments for various large sums, in the Weston common pleas court, against said McDonalds; upon which executions were issued and levied on certain real estate, town lots in Weston, as their property, which was sold by the marshal of the common pleas court. At the sale the respondents became the purchasers for the sum of forty dollars. It further appears from the petition, that, previously to the rendition of said judgments, to-wit, in June, 1853, the said T. D. S. McDonald conveyed to two of the defendants, Cody, Foster, and another since deceased, the same lots which were sold to the plaintiffs at the marshal's sale, in trust to secure Robert Campbell,

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another defendant, who was also a party, the payment of a note given by the firm of McDonald & Adams for \$3,510.09, dated June 15, 1853, due at six months. It is also alleged that said sum of money and interest has been fully paid, and that said property is not released, but continued apparently in force, and so insisted to be by Campbell and McDonald for the purpose of protecting said real estate from McDonald's creditors; that defendant Baker is in possession of said real estate as Campbell's tenant. It is also alleged that the trustees in said deed of trust, at Campbell's request, in September, 1854, offered for sale said real estate, and it was sold to one E. W. Railey for \$1,900; that he refused to take the same on account of some objection to the title, and, by some means unknown to plaintiffs, Campbell was substituted as the purchaser, and a deed made to him by the trustees; that nothing was paid by Campbell for the property, the amount being allowed as a credit on said note, which Campbell knew had been fully paid, and that said trustees had no right to sell. The petition asks that the trustees be compelled to release said real estate from the operation of said deed of trust; that the sale be set aside, and the conveyance made in pursuance thereof be cancelled, and that the title to the real estate be vested in plaintiffs and for possession. Campbell and Cody answer, denying that the balance of said note of McDonald and Adams to Campbell (which was for \$3,510) was ever paid otherwise than by the sale of the trust property to the defendant; aver that there was a balance of \$1,885.59, for the payment of which the trust property was sold; and that one E. W. Railey bought the same for \$1,900, and, not being able to pay that amount, he sold by quit-claim deed to defendant Campbell; that there is yet a balance due defendant, the \$1,900 being insufficient, after deducting expenses, to pay all of said balances. Defendant is willing to convey said property to any of McDonald's creditors who will pay the balance due by said note, interest and costs.

The court found that the debt of McDonald and Adams to Campbell, one of the defendants, which the deed of trust

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of T. D. S. McDonald and wife to Cody, Foster and Baker prayed to be set aside was executed [to secure], was satisfied by Adams before the sale of the property in said deed mentioned was made by the trustees; at which sale E. W. Railey became the purchaser, and, not complying with the sale, Robert Campbell, the defendant, was substituted to the right of said Railey; that the plaintiffs, after said debt was satisfied, became the purchasers at marshal's sale under execution from the Weston court of common pleas, and have obtained a deed to said property from the marshal of said court.

The judgment is that the deed of trust of McDonald and wife to Cody and others as trustees be cancelled and set aside, and that the deeds made by said trustees to E. W. Railey and by said Railey to Campbell be also set aside, and that the title to the lots in said deed of trust mentioned be vested in the plaintiffs; for possession, &c.

As already observed, we have nothing to do with the inquiry, whether all the facts in issue are found by the court, or whether those found were warranted by the evidence—the only question before us being whether the judgment is supported by the finding. The material fact in the case evidently is, whether, at the time of the sale of the property in controversy by the trustees, Campbell had a subsisting lien upon it by virtue of the deed of trust; or, in other words, whether before that time his debt had been paid or satisfied. It is true, the allegation of the petition is that the debt was fully paid, which is denied by the answer; and the court finds that the debt was *satisfied* prior to the sale under the deed of trust. The legal effect of a satisfaction was the same as a payment; it was a discharge of the property from the operation of the deed of trust; and, if so, a sale of the property under the execution and a conveyance passed to the respondents the title of McDonald, if the marshal had any authority to sell real estate and execute deeds therefor. That there was a failure to find specifically the facts of a judgment and levy can not now be inquired into—there having been no motion for a review—except as they may be involved in

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determining whether the conclusion of the court from the facts found was warranted notwithstanding this omission.

Among the facts found is that the plaintiffs became the purchasers at the marshal's sale, and obtained a deed from the marshal for the property sold. Now, if the marshal was authorized to make a deed to real estate sold by him under execution, we are of opinion the facts omitted in the finding were not necessary to the judgment pronounced by the court.

Referring to the act to establish the Weston court of common Pleas, (Sess. Acts, 1851, p. 203,) we find ample authority given to the marshal for that purpose. In regard to the jurisdiction of the court, the tenth section of the act provides as follows: "First, concurrent original jurisdiction with the circuit court of Platte county in all civil actions where the defendant resides and the process is served within the corporate limits of said city; and like concurrent jurisdiction with the said circuit court in all civil cases where the defendant does not reside in said county of Platte and the process is served within the corporate limits of the city; like concurrent jurisdiction with said circuit court in all suits against boats and vessels moored opposite said city, in the Missouri river. Concurrent superintending control with circuit court over justices of the peace within the city in civil cases, and appellate jurisdiction from their judgments in similar cases," &c.; and it has also jurisdiction under certain restrictions where the defendants reside anywhere in the county. "The practice, powers and proceedings shall be the same in all respects as is or may be provided by law for the government of the circuit court except as herein specially provided." (Sec. 15.) The twenty-second section enacts that the judge of said court shall hold three regular terms of his court in each year, the time of which shall be fixed by and determined by the judge; and he may appoint and hold special terms of his court in the same manner as is or may be required by law in the circuit court; and the next section declares that executions issued from said court on judgments therein rendered shall be made returnable at the succeeding term there-



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after unless the plaintiff, or the person to whose use the suit may be brought, shall otherwise direct; then it shall be made returnable at the succeeding term thereafter, at the option of the plaintiff or person having control of said judgment. The only other provision of the act, that need be referred to, is that making it the duty of the marshal of the city of Weston, or his deputy, to attend said court, and execute all process issued by the court, judge or clerk thereof. These several provisions taken together clearly enough show the authority of the marshal to sell real estate at the place of holding said court and to execute deeds to the purchaser. This, we think, is further evident from a moment's reflection, especially on the twenty-second and twenty-seventh sections. By the general law in force when this act was passed, there were two terms of the circuit court held in each year. The act in question (22d section) provides for three terms of the common pleas court, and allows the judge to fix the times of holding them; which of course he may do without any reference to the terms of the circuit court. Another provision (27th section) says, that executions shall be returnable at the next succeeding term after they are issued, unless the plaintiff shall otherwise direct. How, then, are these provisions to have their proper effect unless the marshal, whose duty it is to execute all process, has authority to sell real estate under execution?

The judgment is affirmed; the other judges concurring.

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FRAZIER *et al.*, Respondents, v. BISHOP, Appellant.

1. Where it appeared that on the second day of the term of a court the defendant in a suit on a promissory note, in which no answer had yet been put in, was compelled to appear before the grand jury then in session, and was still before them when the court adjourned at a time early than usual, and was thus prevented from filing his answer before the adjournment of the court, and did afterwards file it with the clerk on the same day; *held*, that he was entitled to have a judgment by default rendered against him on the said second day of the term set aside. (R. C. 1855, p. 1235, § 24.)



*Appeal from Barton Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Bray*, for appellant.

I. The act of 1855 does not confine the time for filing pleadings to the hours the court is in session. (R. C. 1855, p. 1235, § 24, 26.) It is clearly in the power of the court to grant leave to file pleadings at a different time from that specified by the practice act. The court abused its discretionary power in refusing to permit defendant to file his answer.

*Johnson & Ballou*, for respondents.

I. There was no motion to set aside the judgment. (1 Mo. 110.) The defendant was guilty of negligence in not filing his answer on the second day. (10 Mo. 393; 6 Mo. 254; 8 Mo. 679; 21 Mo. 354; 7 Mo. 6; 13 Mo. 207.) He was bound to plead on or before the second day of the term. (R. C. 1855, p. 1235, § 24, 25, 26.) The answer discloses no sufficient defence. The affidavit should have stated the hour the court adjourned; the court may have known that it did not adjourn at an hour earlier than usual. The return term was the trial term.

NAPTON, Judge, delivered the opinion of the court.

This suit was upon two promissory notes, and the defendant having been personally served in due time, judgment was taken on the second day for want of answer; on the third day the defendant moved to set aside this judgment and for leave to file his answer, which was appended to the motion, upon grounds disclosed in an accompanying affidavit. The affidavit of defendant stated that his answer was drawn up and ready to be filed on the second day of the court, with the exception that it was not yet sworn to, and that he was compelled to appear before the grand jury on that day, and that the court adjourned at an earlier time than usual and

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whilst he, the defendant, was still before the jury ; that, as soon as he was discharged, he swore to his answer before the clerk and filed it, but the court had then adjourned. This motion was overruled and an exception taken, which presents the only point for our consideration.

We are unable to perceive any grounds upon which the court was authorized to refuse this application. The defendant, being a witness before the grand jury, could not have any means of knowing how long his attendance there might be required ; and the unexpected adjournment of the court was calculated to take the defendant by surprise. It could be a matter of no sort of importance to the opposite party that the answer was filed an hour earlier or later ; nor is it seen that the dispatch of business generally would be affected by allowing the answer to be filed. But we put the case entirely on the ground that the defendant was, at the time within which he was authorized to file his answer, otherwise employed in obedience to a mandate of the court or its officer, and that his rights ought not to be prejudiced thereby.

The other judges concurring, the judgment is reversed and case remanded.

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GAINNEY, Respondent, v. SEXTON'S ADMINISTRATOR, Appellant.

1. Judgments obtained in a sister state are not entitled, under our administration act, to be classed in the fourth class of claims against the estates of decedents ; they are entitled to no preference over any other debts.

*Appeal from Barry Circuit Court.*

This was an application for the allowance of a demand against the estate of John Sexton, deceased. The demand was founded on a judgment rendered against said John Sexton in his lifetime, in the state of Indiana. The probate

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court of Barry county allowed the demand and placed it in the fourth class of allowed claims. An appeal was taken to the circuit court by the administrator. In the circuit court the plaintiff appeared and moved the court to dismiss the appeal because it was not taken at the term at which the allowance of the demand was made. The court granted the motion.

*Edwards & Ewing*, for appellant.

I. The circuit court erred in dismissing the appeal. The defendant having appeared in the circuit court, it cured all defects. It was the duty of the court to try the case.

*Boone & Cravens*, for respondent.

I. The circuit court had no jurisdiction of the cause, and therefore very properly sustained the motion to dismiss the appeal. (R. C. 1855, p. 174, § 2.)

Scott, Judge, delivered the opinion of the court.

This judgment will be reversed. The probate court clearly erred in placing a judgment rendered in another state in the same class with those rendered in the courts of this state. The judgments of the sister states have no preference over any other debts. Only the judgments rendered in the courts of this state can be placed in the fourth class of demands. (*Harness v. Green's Adm'r*, 20 Mo. 316.)

The bill of exceptions does not show but what the appeal was taken and the affidavit filed during the term of the court. The evidence disproving this is not preserved in the bill of exceptions.

The other judges concurring, the judgment will be reversed and the cause remanded.

McCOLLUM, Defendant in Error, v. LOUGAN'S ADMINISTRATOR,  
Plaintiff in Error.

1. A defendant filed a demurrer to the petition in the suit against him; afterwards, while the demurrer was still pending, in vacation, and without leave previously granted, the plaintiff filed with the clerk of the court an amended petition. At the next term the defendant moved the court to strike out the amended petition; the court overruled the motion, and afterwards gave judgment by default against the defendant. *Held*, that the action of the court upon the motion to strike out the amended petition cured any irregularity in filing it with the clerk in vacation without leave first granted; that the filing of the amended petition having been thus sanctioned, the original petition was superseded, and the demurrer thereto impliedly sustained.

*Error to Jasper Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Kendrick & Grant*, for plaintiff in error.

- I. There was no legal authority to file the amended answer with the clerk in vacation. The court ought to have sustained the motion to strike it out. The court ought not to have rendered a decree upon the amended petition, nor upon the original petition until the demurrer thereto had been disposed of.

*Johnson & Ballou*, for defendant in error.

- I. The court by its action sustained the filing of the answer in vacation without previous leave. The defendant by making the motion to strike out waived the demurrer. He is estopped from making the objection here. (6 Mo. 174, 177, 321; 1 Mo. 534.) The judgment is for the right party. (1 Mo. 115; 6 Mo. 321.) The amended petition superseded the original petition, as well as the demurrer thereto.

EWING, Judge, delivered the opinion of the court.

This was a proceeding, commenced in the county court, to compel the administrator of the estate of S. Lougan, deceased, to execute specifically a contract for the conveyance of

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McCollum v. Lougan's Adm'r.

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land. After the petition was presented in the county court, the case was transferred to the circuit court, leave having been first given to file an amended petition. In the circuit court, a demurrer was filed to the petition at the April term, 1858. The plaintiff filed an amended petition with the clerk in vacation, and at the November term, 1858, following, the defendant filed his motion to strike out the amended petition. The motion was overruled, and the defendant excepted; and no answer having been filed, plaintiff had a decree for the specific performance of the contract. No motion was made to set aside the decree and grant a new hearing, nor in arrest of judgment. The errors assigned are, that the filing the amended petition with the clerk was unauthorized, and that it should for that reason have been stricken out; and that no decree ought to have been entered upon the amended petition until the demurrer had been disposed of.

It may be conceded that the filing the petition with the clerk was irregular; but the subsequent action of the court upon it recognizing it as a pleading in the cause, and as taking the place of the original petition, was equivalent to granting formal leave to file it in term. It may be considered as having been filed for the first time regularly at the November term, 1858, when a motion was made by the defendant to strike it out and overruled. The action of the court in thus overruling the motion, although no previous leave had been given authorizing the amendment, cured any irregularity in filing it with the clerk without leave.

As it respects the second point, we think the amended petition superseded the original one to which the demurrer had been filed, and the amendment having been allowed pending the demurrer, the demurrer was thus impliedly sustained. The amendment to the petition could not have been permitted without at the same time having in effect disposed of the demurrer. Upon the whole case, we can see no such objections to the proceedings as require us to reverse it; and the other judges concurring, the judgment will be affirmed.

RIDDLES, Plaintiff in Error, v. AIKIN *et al.*, Defendants in Error.

1. Interest in the event of a suit will not disqualify a witness; he must, to be rendered incompetent, be a person for whose benefit the suit is prosecuted or defended.
2. An attorney at law is a competent witness in a cause in which he is engaged as attorney; he may testify as to privileged communications made to him by his client, if they are otherwise relevant, when called upon by his client so to do.
3. Where the variance between the allegation in the pleading and the proof is not material, and the adverse party could not have been misled thereby to his prejudice, the court should allow an amendment without costs.

*Error to Greene Probate and Common Pleas Court.*

This was a suit, as originally instituted, by Thomas Riddles against John H. Aikin to recover the sum of two hundred and fifty dollars, alleged to be due and owing to plaintiff. Plaintiff set forth in his petition that defendant was administrator of the estate of Nancy Aikin; that plaintiff purchased the distributive share of James P. Aikin in that estate; that defendant had notice of this transfer; that the defendant, the administrator, with intent to cheat and defraud plaintiff, paid said distributive share to said James P. Aikin. The other distributees of the estate were afterwards made parties to the suit. At the trial the plaintiff introduced William C. Price as a witness, who testified that he, in March, 1851, as plaintiff's attorney, gave defendant notice in the presence of plaintiff of the transfer to plaintiff of the distributive share of James P. Aikin. It also appeared that on March 3, 1852, said John H. Aikin procured an allowance to himself as administrator of a credit for two hundred and fifty dollars paid to James P. Aikin as the latter's distributive share. The court, by an instruction, excluded from the consideration of the jury the evidence of William C. Price as to the notice of transfer. It also refused to allow an amendment as set forth below in the opinion of the court.

The plaintiff took a nonsuit, with leave, &c.

*Parsons*, for plaintiff in error.



I. The court erred in refusing to allow the evidence of William C. Price to go to the consideration of the jury ; also in refusing the amendment sought. The instructions given were erroneous.

EWING, Judge, delivered the opinion of the court.

The ground upon which the evidence of William C. Price was excluded from the consideration of the jury does not appear from any thing in the record or bill of exceptions. He is no party to the action, nor does he appear to be a person for whose immediate benefit the action is prosecuted. If he is neither the one nor the other, although he may have an interest in the event of the action, he is not on that account an incompetent witness. Such interest would not disqualify, but only go to his credibility. But it does not even appear that he had any interest whatever. It is true he was an attorney, but it is not shown that he had any interest in the suit beyond what ordinarily arises from that relation. But be that as it may, the interest, if any he had, so far as we can see, was not such as to render him incompetent. That the testimony related to privileged communications—such as were made to the witness as an attorney—does not disqualify him, because the witness was introduced and examined by the client himself, (who was the plaintiff below,) and the seal which the law fixes upon such communications being thus removed by the client himself, the attorney became a competent witness. (R. C. 1855, p. 1578, tit. Witnesses.) The court erred, therefore, in excluding the testimony of W. C. Price from the jury.

We think the court erred also in refusing the amendment to the petition without the payment of costs. The amendment proposed was the *date* of the settlement of the defendant as administrator in the probate court. The allegation of the petition as to this matter is, that the defendant afterwards, to-wit, on the —— day of ——, 185—, at a term of the court of probate aforesaid not his regular term, procured himself, as such administrator, to be credited with said re-

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ceipt for said sum of two hundred and fifty dollars. On the trial, the bill of exceptions states that it was proved, among other things, by the record of settlement, that defendant got on settlement on the 3d of March, 1852, in the court of probate, a credit of two hundred and fifty dollars as the distributive interest of the said James P. Aikin of said estate. After this evidence had been given on the trial, the plaintiff asked leave to amend the petition by inserting the date of the settlement, which was refused by the court except on condition that the plaintiff should pay the costs of the term. Our practice act enacts that no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits; (R. C. 1855, p. 1253;) and that, when the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. (Ib.)

The amendment proposed related to a fact of which the defendant, of course, had knowledge. As administrator, he knew when he made his settlements with the court; the fact of the settlement itself was averred in the petition; and the defendant was apprised by the petition that the plaintiff would claim interest, on the amount for which it is alleged he obtained credit, from the date of such settlement. Being thus fully advised of the ground of the plaintiff's claim and the time from which interest would be claimed, the defendant must be presumed to have come prepared to contest it; and he could not therefore have been misled or surprised had the amendment asked been permitted. His defence upon the merits could not have been prejudiced or affected by such an amendment; and we think the discretion of the court below was improperly exercised in refusing it except upon the terms sought to be imposed.

The judgment will be reversed and the cause remanded; the other judges concurring.

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Jones v. Plummer.—Nickerson v. Gilliam.

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JONES, Appellant, v. PLUMMER *et al.*, Respondents.

1. The supreme court will not grant new trials on the ground that verdicts are against the weight of the evidence.

*Appeal from Greene Probate and Common Pleas Court.*

*Parsons & Price*, for appellant.

*Oliver & Ewing*, for respondents.

NAPTON, Judge, delivered the opinion of the court.

The instructions given in this case were correct; and though it is not easy to see the grounds upon which the jury failed to give the plaintiff a verdict for at least nominal damages, yet as questions of this kind fall with peculiar propriety within the province of juries, and the court which tried the case has refused to interfere, we shall let the verdict stand.

Judgment affirmed.

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NICKERSON, GUARDIAN OF MARTIN, Respondent, v. GILLIAM *et al.*, Appellants.

1. Where a promissory note is given to a guardian of an insane person as guardian, he may institute suit upon it in his own name.
2. Where the guardian institutes suit upon such note in his own name, the defendant may plead by way of set-off a debt due him from the insane ward.

*Appeal from Chariton Circuit Court.*

*Shackelford & Turner*, for appellants.

I. Martin's indebtedness was a good set-off against the note sued on to his use. The admissibility of the set-off depends not upon who are the nominal parties to the suit, but upon who are the real parties in interest. (2 Parsons on Contr. 244, 251; 4 Wash. C. C. 93; 7 Cush. 217.) The set-off be-

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ing due to one of the defendants does not affect the case. (Kent v. Rogers, 24 Mo. 306.)

*Harris*, for respondent.

I. The note was the individual property of Nickerson; the words "as guardian" are merely *descriptio personæ*. (19 Mo. 193; 5 Mart. N. S. 703; 5 Mart. O. S. 201; 2 Wheat. 55.) If the demands offered as set-off in the answer exceed the sum sued for, against whom would the judgment go? not against Nickerson, the plaintiff, because he does not owe these debts; not against Martin, for he is not a party to the action.

EWING, Judge, delivered the opinion of the court.

This was an action on a promissory note executed by the defendants, who are the appellants, to the plaintiff "as guardian" of the estate and person of one Martin, a person of unsound mind, for four hundred dollars. The answer admits the execution of the note, but pleads as set-off a promissory note of E. Martin to one of the defendants, and certain other debts transferred to said defendant by third persons alleged to be due from said Martin. The answer also avers that the suit is prosecuted for the use and benefit of Martin, and that the note was given for property of said ward, which had been sold by the guardian. The answer was stricken out, and judgment was rendered for the plaintiff for want of answer. A motion to set aside the judgment having been overruled, the defendants bring the cause to this court by appeal. The question for our consideration is, was the proposed set-off admissible?

It has been heretofore decided by this court that the words "guardian," &c., in a note were mere *descriptio personæ*, and that the note or instrument was evidence of a debt due the person named as payee therein, and might be sued on by the legal representative of such person; in other words, that the payee of the note therein named as guardian had the title thereto notwithstanding these words. (Jeffries v. McLean, 12 Mo. 538; 19 ib. 195.)

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There is no doubt, according to these decisions, that the plaintiff in the case at bar was the legal owner of the note on which the suit is founded, and was the proper party to sue. But if the ward was the party really and beneficially interested, and the suit is prosecuted for his benefit, as the defendants allege in their answer, was it not admissible for him to prove this, and set off a debt which the ward was owing him? Why not allow demands, which are really mutual as between the ward and defendants, to be adjusted in the same suit, although the debt sued for is nominally due to the plaintiff as guardian? Cases may be supposed where a contrary rule would work hardship to the sureties of the guardian, as, for instance, where the guardian might be insolvent. The ward would have indemnity in the bond of his guardian, it is true; but the latter would be allowed to pocket the money of his ward, for which the sureties would be responsible—a hardship that could be prevented by compelling the party beneficially interested to submit to a set-off of demands against him by pleading them against the nominal plaintiff. If the state of the accounts between the guardian and his ward was such as to make the ward the debtor instead of the creditor of his guardian, I presume he would be allowed to allege this in his replication to the answer and prove it and thus prevent any hardship to the guardian. It is always admissible in an action by or against a trustee to plead a set-off of money due to or from the *cestui que trust*. (1 T. R. 622.) It is made the duty of the guardian to prosecute and defend all actions instituted by or against his insane ward. His relation to the ward is a fiduciary one, and he is to all intents and purposes a trustee, having, subject to the supervision of the courts, the entire control and management of his ward's estate. Now, although the statement in the note of the fiduciary character of the plaintiff is not conclusive evidence of the fact, or that a trust attaches with respect to the note, yet the plaintiff admits the fact of guardianship; and if the defendant can show that the transaction upon which the suit is founded was one in which the ward

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had the beneficial interest, as that the note was given, for example, for property of the ward, as the answer states, why may not the defendant have the benefit of his set-off without being driven to another action to recover it, when the result would have been the same? In *Ward v. Martin*, 3 Mo. 19, it was held that a set-off was admissible under circumstances similar to those in the case before us. In that case the defendant was permitted to prove that the suit was for the benefit of a third person, to whom the beneficial interest in the note (which was the foundation of the suit) belonged at the time suit was brought, and that such third person was indebted to the defendant Ward in a much larger sum than the principal and interest of the note. It was held that it was competent for the defendant to avail himself of the equitable matter attempted to be proved in avoidance of the recovery which was sought against him.

The judgment will be reversed and remanded, the other judges concurring.

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HALYARD, Appellant, v. DECHELMAN, Respondent.

1. A watchmaker who receives a watch to repair is bound to use ordinary diligence in its safe-keeping; if the watch while in his custody be stolen through his negligence he will be liable. A demand for the watch by the bailor would not in such case be necessary to entitle him to sue.

*Appeal from Weston Court of Common Pleas.*

This was an action to recover damages for the loss of a watch alleged to have been left with the defendant, a watchmaker and jeweller, for repairs. Plaintiff alleged that the watch, through the carelessness and negligence of the defendant, was lost, destroyed or stolen. The defendant in answer put in issue the ownership of the watch; admitted he had received a watch for repairs from a son of plaintiff, and alleges that his store was burglariously entered and the watch



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stolen, with a number of others belonging to defendant, and without negligence on his part. Evidence was adduced showing the manner in which the watches were kept and the facts connected with the entry of the store and the stealing of the watch of plaintiff. The court, among other instructions, gave the following: "1. The plaintiff is not entitled to recover without averring and proving a demand and a tender of the amount of repairs."

Plaintiff took a nonsuit, with leave, &c.

*J. N. & C. F. Burnes*, for appellant.

I. No demand was necessary. (*Ross v. Clark*, 27 Mo. 550.) There is no issue in the pleadings as to the repairs. The defendant neither alleges nor proves that he had made any repairs.

*Doniphan & Lawson*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

A watchmaker, who receives a watch to repair for hire, is bound to use ordinary diligence for the safe keeping of the watch left with him for that purpose. Ordinary diligence is that degree of care in the preservation of a thing which a prudent father of a family would use for the safe keeping of it if it was his own. (*Story on Bailments*, § 429, 398.)

The law compels no man to do a vain and nugatory thing. As the watch had been stolen and never regained, a demand of it would have been an act of folly. It did not appear that any sum for repairs was due; and if there had been, it would have been subject to the same law as the watch, being payable or not as the watchmaker was guilty or not of the want of ordinary diligence.

Reversed and remanded. The other judges concur.

GOTT, Respondent, v. WILLIAMS *et al.*, Appellants.

1. From the date of the delivery of an execution issued by a justice of the peace to the constable, it is a lien on the personal property of the defendant "found within the limits within which the constable or other officer can execute the process." The lien commences only upon such delivery. (R. C. 1855, p. 964, § 5.)
2. Where a judgment is rendered by a justice of the peace of one township and the defendant resides in another, and the execution issued is directed to the constable of the township in which the judgment is rendered, the lien of the execution will be coextensive with the county. (R. C. 1855, p. 964, § 6.)
3. The officer receiving an execution from a justice of the peace should endorse thereon the time of its receipt. The docket of the justice can not be received in evidence to show the date of the receipt of the execution by the constable.
4. The fact that the plaintiff in a suit has engaged to pay over to another the sum sued for when recovered does not render such person an incompetent witness in behalf of the plaintiff as being the person for whose benefit the suit is prosecuted.

*Appeal from Greene Circuit Court.*

It is sufficient to state, in addition to the facts stated in the opinion below, that Canefox stated on cross examination that he agreed with Gott that he would pay back the purchase money of the horse, and that Gott was to commence this action and prosecute it for the benefit of Canefox; that he (Canefox) was to pay all costs that might accrue, and have whatever might be recovered; that he afterwards did pay back the said purchase money. The following is the instruction alluded to in the opinion of the court: "1. If the jury believe from the evidence that Forbes as constable took out of possession of plaintiff a horse and sold him at the instance of Williams, they must find for plaintiff as against Williams the value of the horse in the way of damages.

*Waddell & Orr*, for appellants.

I. The court erred in refusing to exclude from the consideration of the jury the testimony of Canefox. He was the real party in interest. The court also erred in refusing to

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permit defendants to read to the jury the transcript of the docket of the justice. (25 Mo. 334.) The horse when bought of Goodrich was subject to the lien of the execution. The court erred in refusing the instructions asked by the defendants.

*Parsons & Price*, for respondent.

I. Canefox was a competent witness. The transcript was properly excluded. It was not properly authenticated. The instruction given for the plaintiff, taken in connection with those given for defendant, properly presented the law of the case to the jury. There was no evidence to show that there was a lien upon the horse at the time of the private sale by Goodrich.

NAPTON, Judge, delivered the opinion of the court.

In this case the defendant Williams had obtained a judgment before a justice of the peace in Porter township, of Greene county, against Goodrich and Ricketts, the former of whom lived in Campbell township of the same county. The execution was issued on the 30th of June, 1857, and directed to the defendant Forbes, constable of Porter township. The execution was renewed on the 12th of September, and on the 8th of December the constable levied on a horse, then in the possession of Gott, the plaintiff. The horse had been purchased by Gott of one Canefox, who had bought him of Goodrich, defendant in the execution, about the last of August of the same year.

One question presented by the instructions asked by the defendant is, whether the writ was a lien from the date of its teste. The decision of the court on this point was in accordance with what we understand to be the plain implication of our present statute on this subject. The statute directs the officer to endorse on the writ the time of its receipt, and declares that, from the time of its delivery to the constable, it shall be a lien on the personal property of the defendant in the execution "found within the limits within

which the constable or other officer can execute the process." (R. C. 1855, p. 964.) Whatever may have been the common law relative to the lien of executions, this statutory provision clearly restricts the period of its commencement to the delivery of the writ to the officer, without regard to the period when it was issued. The refusal of the circuit court to give the instruction which the defendant asked, declaring the law to be that "during the running of the writ" the execution was a lien, was therefore proper.

Another question presented in a case of this kind, where the judgment is obtained in one township and the defendant resides in another is, whether the lien reaches the property of the defendant in the township where he lives, or only takes effect from the levy. The statute declares the lien to reach all the personal property of the defendant found "within the limits within which the constable or other officer can execute the process." Where the defendant lives in one township, and the plaintiff in another, or where there are two defendants living in different townships, the suit may be brought in the township where the plaintiff resides, if the defendants or either of them be found therein; and in such cases it is at the option of the plaintiff, who obtains judgment, to have his execution directed to the constable of the township where the judgment is rendered, or to the constable of the township where the defendant resides or has property. In the first case, the officer may execute the writ throughout the county. (R. C. 1855, p. 964, § 6.) The lien in such cases would be co-extensive with the limit of the officer's jurisdiction, and would therefore reach any personal property of the defendant within the county, after the delivery of the writ into the hands of the officer.

In this case there was no proof as to the time when the execution came into the hands of the constable. There was no endorsement on the execution as the law requires. The docket of the justice was offered with a view to show the time when the execution came to the hands of the constable, but this was excluded. It is not material whether the exclu-

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sion was proper or not, since had it been introduced it could not have established the fact sought to be proved by it, nor was it any evidence of it. The statute makes it the duty of the constable to endorse on the back of an execution the time of its receipt. It is no part of the duty of the justice, even if he happened to have a personal knowledge of the time when the writ reached the officer's hands. A statement, therefore, by the justice, in his docket, upon this subject, is no official act, and is entitled to no weight as a piece of evidence. The constable, having failed to state the fact in his return, might have been permitted to amend his return; but this was not offered, and the docket of the justice was no evidence on this point, whether properly authenticated or not.

We think Canefox was a competent witness. His testimony shows that it was not his intent to extinguish the claim of Gott, the plaintiff, but merely to save him from all risk. The trespass, if any, was committed on Gott and whilst he owned the horse. He was the proper person to sue. Canefox would have been responsible over to him for the value of the horse in the event the suit failed. This responsibility Canefox anticipated by handing over to plaintiff the purchase money, but it would not be reasonable to suppose it was his intention to take an assignment of the right of action for the trespass.

The first instruction given for the plaintiff in this case is manifestly wrong. It leaves out of view altogether the question of property in Goodrich, and the lien of the execution from the time it came into the hands of the constable. We shall remand the case for a new trial. Judgment reversed and remanded; the other judges concur.

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CARTER, Appellant, v. MCCLINTOCK, Respondent.

1. Delivery is necessary to the complete execution of a promissory note; if the payee obtain possession thereof by fraud he can not maintain an action thereon.

*Appeal from Buchanan Circuit Court.*

This was an action on a promissory note for \$663.33. The defendant in his answer admitted the "execution" of the note set out in the petition, but set up by way of defence that the same was proved by falsehood and fraud. He states that in June, 1857, he entered into a "conditional contract" with the plaintiff, by which defendant and one Murray were to become the purchasers of a certain piece of ground at the price of \$3,000, \$1,000 to be paid down, the remainder in three equal instalments of six, twelve and eighteen months; that it was expressly understood that the contract was to take effect and become binding only in case Murray would become a party with defendant in the contract and become jointly bound for the purchase money, but in case Murray should refuse to take half the land and become jointly bound for the purchase money the contract was to be considered null and void; that with this understanding defendant deposited \$1,000 with plaintiff, and at the same time three promissory notes were drawn up for the signatures of defendant and Murray, also a bond conditioned for the conveyance of said land to said Murray and defendant; that defendant then signed the notes, and they, with the bond, were placed in defendant's hands in order that he might submit them to Murray; that he did submit the notes and bond to Murray for approval or rejection; that Murray refused to ratify or approve said contract, or become a party thereto, or sign said notes; that shortly after defendant notified plaintiff of this decision and demanded the return of the \$1,000; that defendant retained said notes in his possession until some time in November, 1857; that in a conversation between plaintiff and defendant in relation to the above agreement plaintiff asked defendant the privilege of looking at the notes; that defendant, not suspecting any fraudulent design, handed the notes to him for inspection; that plaintiff having got them in his possession put them in his pocket and left defendant, and refused to return the notes or the \$1,000, although de-



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manded by the defendant; that the note sued on is one of those notes so obtained by plaintiff; that the possession was procured by fraud.

At the trial evidence was adduced showing that plaintiff obtained possession of the notes in the manner stated in the answer. A letter written by one C. E. Kemp, in behalf of plaintiff, was admitted in evidence in behalf of defendant. Kemp stated that he wrote the letter at the request of plaintiff; that he was acting as his clerk and agent; that he had embodied in the letter the ideas he had derived in relation to the sale of the land and the execution of the notes from conversations with Carter, the plaintiff; that at the time the letter was written Carter was in St. Louis, and had previously to leaving requested witness to attend to the matter. The letter is as follows: "St. Joseph, Mo., October 2, 1857. Mr. Joseph McClintock: Dear Sir—This will certify that the bearer, Mr. Leopold, is authorized to close the trade between W. M. Carter and McClintock and Murray, being a sale of five acres of land, for the sum of \$3,000, on which purchase you have paid \$1,000 cash, and for the balance, \$2,000, per agreement, you were to execute your joint promissory notes for \$1,000 cash, one of said notes being payable six months after date, and the other payable twelve months after date from the date of the purchase of said land. Mr. Carter is at present absent at St. Louis and has requested me to attend to this matter for him, and have no doubt but that you will fulfill any contract made with him in regard to this transaction. Yours, very respectfully, [signed] W. C. Carter, by C. E. Kemp." By the bond, which was given in evidence, three notes, of \$663.33 each, were to be given.

The court refused the following declarations of law asked by plaintiff; "2. There is no evidence offered in behalf of defendant to sustain his answer or entitle him to a verdict." The following declarations of law asked by defendant were given: "1. If the purchase was made in the name of defendant and John D. Murray of the land in question, in consideration of which the note sued on was given, and the

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plaintiff refused to accept the note until the signature of said Murray was procured thereto, and that said Murray refused to sign the same, and plaintiff afterwards got possession of the note in question under pretence of examining the papers, and refused to redeliver the same to the defendant, then the law of the case is for defendant. 2. If the contract was not to be completed until Murray's signature was procured, and that defendant by false representations got possession of said note knowing that the said Murray had failed to sign the same, then the law of this case is for defendant. 3. If the plaintiff got possession of the note sued on under the pretence of looking at the same, and without the consent of plaintiff retained possession of the same, then he is not entitled to recover on the same. 4. The execution and delivery of the note by defendant and Murray was a part of the contract, and unless the same was executed by them and delivered to the plaintiff by defendant the law of the case is for the defendant."

The court found for defendant.

*H. M. & A. H. Vories*, for appellant.

I. The letter of Kemp was improperly admitted. Kemp's had no authority to make admissions. He knew nothing about the contract. The declarations of law given were erroneous. The agreement alleged in the answer is entirely disproven. There is a fatal variance, and a total failure of proof. (R. C. 1855, p. 1285; 17 Mo. 585; 19 Mo. 30; 18 Mo. 403; 20 Mo. 229; 22 Mo. 27.) The notes were delivered to Carter. He sent them by defendant to get Murray's signature. Defendant has kept the bond, and may have it yet for all that appears.

*Gardenhire*, for respondent.

I. The letter of Kemp was properly admitted. The declarations of law given were proper. (See 3 Johns. 534; 7 Johns. 470; 4 Call, 379; 4 Wheat. 225; 1 Sumn. 218.) The notes were never delivered. The answer puts in issue the delivery.

SCOTT, Judge, delivered the opinion of the court.

We see no grounds on which to place a reversal of this judgment. The letter written by the authorized agent of the plaintiff and at his request, although not dictated by the plaintiff, was evidence against him. It appears that he was, from conversations with the plaintiff, familiar with the subject about which he wrote, although he happened to fall into a mistake in stating the terms of the contract. But we do not see how the plaintiff was injured by the admission of the letter in evidence. He stands here claiming an advantage from the error into which the clerk was betrayed in describing the contract.

The written contract could only be resorted to in order to ascertain the understanding of the parties. We do not comprehend what is meant by the variance between the answer and the proof. Surely it is not founded on the allegation in the answer that the agreement was conditional, when the whole context of the answer shows that that word had not, nor was intended to have, any other sense than to show that the contract was not complete and had not been fully executed. The suit was on a note, and the answer set up the defence that the note had never been delivered; that the contingency, on which it was to be delivered—the entire fulfillment to the contract by all the parties to it—had not happened when the plaintiff, by fraud and falsehood, obtained possession of it. But it is said that the answer admits that the defendant executed the note. We can very well see how this happened. As the law required the answer to be sworn to, and as the defendant knew the signature to the note was his, he was unwilling to swear that he did not execute it, that is, did not sign it—not intending thereby to admit that the note was a complete instrument or had ever been delivered. The attorney might have been a little more choice in his language and avoided this nicety. But, for an objection like this, to subject a man to the payment of a large sum, under the circumstances of this case, would be an outrage upon justice.

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Hursh v. Byers.

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It clearly appeared that the note sued on was one of those referred to in the answer ; and the facts of the answer being clearly proved, the declarations of law made by the court were correct, and those denied to the plaintiff were properly refused.

The other judges concurring, the judgment is affirmed.

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HURSH, Respondent, v. BYERS, Appellant.

1. An innkeeper has a lien upon the goods of guests only, not upon the goods of persons boarding with such innkeeper under a special contract.

*Appeal from Greene Circuit Court.*

This was an action commenced before a justice of the peace. An appeal was taken to the circuit court. The facts as they appeared in evidence are as follows : Plaintiff in 1858 kept a hotel in Iowa city, Iowa. One Mrs. Acor boarded with him. When Mrs. Acor was on the point of leaving, the plaintiff presented her bill, and told her she could not remove her trunk from the room she occupied until the bill was paid. The defendant Byers, under these circumstances, promised plaintiff, if he would let Mrs. Acor have her baggage, that he would go her security for the payment of the bill. Upon this promise plaintiff permitted Mrs. Acor to remove her trunk. Mrs. Acor had been a regular boarder at the hotel for two years, paying a stipulated sum per week for her board. The defendant asked the court to declare the law to be that "if defendant promised or assumed to pay the debt of another person to the plaintiff, it is not binding upon the defendant unless such promise was put in writing and signed by him ;" also "that innkeepers or boarding-house keepers have no lien on the baggage of their regular boarders for the general balance of their board bill ; that when a person ceases to be a traveler or wayfaring man, and becomes a boarder, such person ceases to be a guest in such a sense as

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Ridens v. Ridens.

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to hold the innkeeper to his peculiar liability, or to give him a lien on the baggage of such person." The court refused so to declare and found for the plaintiff.

*Lindenbower*, for appellant.

I. Hotel keepers have no lien upon the baggage of boarders. The promise of defendant was within the statute of frauds.

*Parsons & Price*, for respondent.

I. The case is not within the statute of frauds. The plaintiff had a lien on the baggage. The agreement was in consideration of the release of this lien. This was a sufficient consideration. (2 Parsons on Contr. 306, note.)

SCOTT, Judge, delivered the opinion of the court.

Story says, if a person comes upon a special contract to board and sojourn at an inn, he is not in the sense of the law a guest, but he is deemed a boarder. (§ 477.) The law gives the innkeeper a lien on the goods of a guest, not of a boarder. (§ 476.) The plaintiff having no lien on his boarder's goods, he had no right to retain them; consequently there was no consideration for the promise made by the defendant to pay the board for which this suit is brought.

The other judges concurring, the judgment will be reversed and the cause remanded.

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RIDENS, Respondent, v. RIDENS, Appellant.

1. If there be any evidence introduced tending to prove a fact relied upon by a party to a suit, it is error to refuse instructions putting that fact to the jury.

*Appeal from Wright Circuit Court.*

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

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Beardslee v. Morgan.

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———, for appellant.

*Edwards & Ewing*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The record in this case shows the refusal of the court of all the instructions asked by the defendant based upon the hypothesis of a special contract between plaintiff and defendant. There was evidence of such a contract sufficient to justify the court to put the case to the jury on that ground, and let them pass upon the question. As the court refused to do this, the judgment must be reversed and the case remanded.

Judge Ewing was of counsel and did not sit. Judge Scott concurs.



BEARDSLEE *et al.*, Appellants, v. MORGAN, Respondent.

1. If the bond filed by a plaintiff in an attachment suit be insufficient, he has a right to file another. (R. C. 1855, p. 242, § 9.)

*Appeal from Greene Circuit Court.*

*Price, Parsons, Boyd & Price*, for appellants.

*Barker, Wilks & Hendrick*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a suit begun by attachment. The attachment bond was signed by the attorney at law of the plaintiffs, for and in their behalf, without any special authority for that purpose. The name of the plaintiffs having been signed without authority, on that ground a motion was made to quash the attachment. Before the motion was determined the plaintiffs appeared to file a sufficient bond; the court would not permit this, but sustained the defendant's motion.

The bond being deemed insufficient, the court, under the



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ninth section of the first article of the act concerning attachments, should have granted the plaintiffs' motion, and allowed a new bond to be filed. (Tevis, Scott & Tevis v. Hughes, 10 Mo. 380.)

The other judges concurring, the judgment will be reversed and the cause remanded.

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HANSARD, Plaintiff in Error, v. REED, Defendant in Error.

1. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gives a return bond and receives the property sued for, and fails to prosecute the action with effect, an assessment of the value of the property and of damages for its detention may be made and judgment against the plaintiff rendered, as directed in sections eight and nine of the replevin act of 1845. Summary statutory proceedings may also be had under section nine of the eighth article of the practice act of 1849. The party may also, after the final determination of the suit, resort to his common law action on the return bond, and may recover full damages within the limit of the penalty, although no judgment may have been rendered for the return of the property or for damages.
2. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gave a return bond and received the property sued for, and the court sustained a demurrer to the petition, and gave judgment for costs against the plaintiff, no assessment of the value of the property or of damages for its detention being made, nor a return of the property awarded, and afterwards the court at the same term granted the plaintiff leave to amend his petition; *held*, that the grant of leave to amend impliedly set aside the judgment for costs against plaintiff and reinstated the cause; and that the cause being still undetermined it would be premature for the defendant to institute a suit on the return bond.

*Error to Callaway Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Hardin & Hayden*, for plaintiff in error.

I. The only point raised in the court below and for decision here is as to the assessment of damages upon the breach "to prosecute the action with effect." (See *Berghoff v. Heckwolf*, 26 Mo. 512; *Morris on Replevin*, 590; *Brown v. Parker*, 5 Blackf. 291; *Rolvan v. Stratton*, 2 Bibb; *Gibbs v.*

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Bartlett, 2 Watts & Serg. 29; Waterman v. Yea, 2 Wilson, 42; Perrean v. Beran, 5 Barn. & Cress. 284.) Any judgment which is in its nature final is all that the authorities require. There was a final judgment in this case. (See Palmer v. Crane, 8 Mo. 619; Smith v. Wilson, 10 Mo. 300.)

The court committed error in excluding the evidence by the plaintiff in reference to the value of the slave Milly and the value of her hire which constituted the essential demand and cause of action of plaintiff. (R. C. 1855, p. 1245, § 11, p. 1246, § 19.) The court committed error in refusing the instructions asked for plaintiff, and in giving the instructions as prepared and given by the court. (R. C. 1855, p. 649, § 7.)

*Gardenhire & Boulware*, for defendant in error.

I. No final judgment appearing upon the record, the cause must be dismissed. (R. C. 1855, p. 1294, § 1; 3 Mo. 238; 5 Mo. 62, 64; 8 Mo. 619, 622; 9 Mo. 179; 20 Mo. 432.) There was no error in excluding the evidence of the value and hire of the negro, nor in refusing and giving instructions. (R. C. 1855, p. 1243, § 3.) Return of the negro was not adjudged, and a failure to return was no breach of the bond. The terms of the obligation are prescribed by statute and are different from those prescribed by the third section of the act of 1849, under which *Berghoff v. Heckwolf*, 26 Mo. 511, was decided. The assessment of the value of the property and damages is important; (R. C. 1855, p. 1245, § 11;) and the judgment goes against the plaintiff and his securities. (R. C. 1855, p. 1245, § 12.) The writ of *retorno habendo* is revived. (R. C. 1855, p. 1246, § 18.)

SCOTT, Judge, delivered the opinion of the court.

This was an action on a bond given in a suit for the claim and delivery of personal property. The suit on which the bond was taken was begun under the act of 1849, before the code of 1855 went into operation. A demurrer having been sustained to the petition filed in the suit on which the bond was taken, there was a judgment for costs against the

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plaintiff, but no assessment of the value of the property or of damages for its detention; nor was any return of the property awarded. After this judgment, and during the same term, the court granted the plaintiff leave to amend his petition. From the record of the case, as it is in the bill of exceptions, it does not appear that any further steps were taken in it—there being no return of the property awarded, nor its equivalent in damages, nor any damages awarded for its detention. This suit was commenced on the bond to recover the value of the property and damages for its detention. The court below held that the plaintiff in this suit on the bond could not recover the value of the property delivered to the defendant in the action in which he was plaintiff and in which he executed the bond, the foundation of this suit.

The defendant was mistaken in supposing the bond on which this suit is brought was executed under the code of 1855. It was made before that code went into operation, so that this case does not differ from that of *Berghoff v. Heckwolf*, 26 Mo. 511, and would be decided by it but for the reason that this suit was brought prematurely—the suit on which the bond, the foundation of this action, was given not having been finally disposed of when this proceeding was commenced. As the court gave the plaintiff leave to amend his petition, such a step on the part of the court impliedly set aside the judgment against the plaintiff, and reinstated the cause on the docket, where it is still pending. In the case of *Lane v. Kingsbury*, 11 Mo. 408, this court held that as the new trial could not have been granted but by setting aside the former judgment, the granting of the new trial impliedly set aside that judgment.

As the effect of reversing this judgment on the ground on which it is placed is to declare the first suit still pending, the plaintiff in this action can defend that suit, and if he succeeds he can proceed in the manner pointed out in the act of 1849, as it is explained in the case of *Collins v. Hough*, 26 Mo. 152; or when the cause is finally disposed of he may sue on the bond. The other judges concurring, the judgment will be reversed.

## THE STATE, Respondent, v. Cox, Appellant.

1. An indictment charging that the defendant "on, &c., at, &c., did unlawfully sell intoxicating liquors in less quantity than one gallon without then and there having a dram-shop keeper's license, or any other authority," &c., is insufficient; the indictment should set forth the particular acts constituting the violation of the law upon which the indictment is framed.

*Appeal from Dade Circuit Court.*

———, for appellant.

*Knott*, (attorney general,) for the State.

I. It is not necessary to set forth in the indictment the particular kind of liquor sold. (6 Blackf. 105, 554; 28 Pick. 275.)

SCOTT, Judge, delivered the opinion of the court.

The statute enacts that no person shall directly or indirectly sell intoxicating liquors in any quantity less than one gallon without taking out a license as a dram-shop keeper. The defendant was indicted under this section, and it is charged that on, &c., at, &c., he did unlawfully sell intoxicating liquors, in less quantity than one gallon, without then and there having a dram shop keeper's license, or any other authority, &c. We have gone a great way in endeavoring to uphold the proceedings in criminal cases, but we see clearly that the farther we go the further we are required to go. A case that barely escapes reversal is considered as establishing a principle, and it is used as a precedent by which we are required to make some still wider departure from the requirements of the law. There is no policy in this. The sooner the circuit attorneys are taught that they must have some regard to law in drawing their indictments the better it will be for the state, who will thereby save thousands in costs. The great liberality in the courts in this matter only begets carelessness and inattention, which result in the escape of offenders, the increase of appeals and delays, and the great multiplication of unnecessary costs.

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State v. Kelly.

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The rule that in describing an offence it is sufficient to use the words of the statute creating it is greatly misapplied and perverted when called in support of the indictment in the record before us. No one ever supposed that it meant to sanction an indictment charging one generally with the offence specified in the statute, without containing any particular act showing that the general provision has been violated. The rule means that the act, charged in the indictment as violating the general law, must be described by the words of the statute; as if the law forbade one to strike another, it would not do to charge in an indictment under it, that A. did beat C.; or if the law forbade any one to sell any particular thing, an indictment under it, that A. disposed of for money the thing prohibited, would be bad. The objection to this indictment is that it charges no particular act showing by its description in the words of the act that the general provision had been violated. What would be thought of an indictment charging one generally with the felonious stealing of horses? The selling of a gallon of liquor at one time, to be taken away or used in less quantities at the will of the purchaser, was an evasion of the law not to be tolerated.

Judges Napton and Ewing concurring, judgment will be reversed.



THE STATE, Defendant in Error, v. KELLY, Plaintiff in Error.

1. State v. Cox, ante, p. 475, affirmed.

*Error to McDonald Circuit Court.*

*Payne*, for plaintiff in error.

*Knott*, (attorney general,) for the State.

SCOTT, Judge, delivered the opinion of the court.

For opinion, see the case of Cox v. State, decided at this term. Judgment reversed; Judges Napton and Ewing concurring.

THOMPSON *et al.*, Appellants, v. MOSELY, Respondent.

1. A court may, on such terms as may be proper, amend a pleading by striking out the name of a party. If the ends of justice require it, it must permit such amendment.

*Appeal from Andrew Circuit Court.*

This, as originally instituted, was a suit against Robert C. Mosely by William N. Thompson and eleven others, including Sinclair K. Miller and Benjamin F. McCart. The plaintiffs alleged that on the 6th March, 1858, they became securities of defendant Mosely and one A. M. Mitchell on five several promissory notes for \$1,000 each, bearing date said March 6, 1858, and payable six months after date to one John Gooding; that said Mosely and Mitchell failing to pay said notes, the plaintiffs had the same to pay to the parties to whom they were assigned. They prayed judgment for the amount of the notes. The court sustained a demurrer to this petition, and gave leave to amend. Afterwards an amended petition was filed. In the title of this petition all the plaintiffs' names are set forth. The body of the petition is substantially as follows: "Plaintiffs, Sinclair K. Miller and Benjamin N. McCart, by leave of court had for said purpose for an amended petition in the above entitled cause, state that "on the 6th of March, 1858, they were partners; that on said day at the request of defendant Mosely they as partners, together with others, signed and executed five several promissory notes for \$1,000 each; which were dated March 6, 1858, and were payable to John Gooding or order six months after date, and were executed by A. M. Mitchell and said Mosely as principals, and were signed by the plaintiffs Miller and McCart as the securities of said Mitchell and Mosely; that Mitchell and Mosely failed to pay said notes at maturity; that the plaintiffs Miller and McCart, still being partners, were compelled to and did pay of the amount of said notes the sum of \$455.55 to the legal holders of said



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notes ; that neither the defendant Mosely nor said Mitchell has repaid said sum of money to plaintiffs or any part thereof. Plaintiffs pray judgment for said sum with interest.

The action of the court upon this petition is set forth below in the opinion of the court.

*Vories & Vories*, for appellants.

I. The court should have allowed the amendment. The plaintiffs Miller and McCart had a right to strike out any part of their petition independent of any leave or discretion of the court. (See 16 Mo. 225.) The defendant could not have been injured by the amendment.

*Woodson, Hall & Loan*, for respondent.

I. The motion to strike out a portion of the plaintiffs' names was properly overruled. The amended petition set out a new and independent cause of action. By striking out those names, there would have been pending a new suit. To allow this would not be "in furtherance of justice;" especially where a large amount of property had been attached and sold. If the motion was properly overruled, the demurrer was rightly sustained.

EWING, Judge, delivered the opinion of the court.

The questions in this case arise upon the action of the court in overruling appellants' motion to strike out all the names of the parties plaintiff except Miller and McCart ; and in sustaining the demurrer to the amended petition.

Under the amended petition filed by the plaintiffs—who are appellants—it is very evident that the only real parties to the action, or the only parties who show any cause of action against the defendants, are the plaintiffs Miller and McCart. The petition does not pretend to allege any claim or cause of action in favor of the other parties ; and their only connection with the suit is that of simply being named as plaintiffs in entitling the cause. Had the action been brought in this way originally, we think there could be no doubt that on the

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trial, or even after judgment, the names of these parties could have been stricken out; (R. C. 1855, p. 1253, § 3, 6;) and it would be an improper exercise of discretion to refuse it. They had no interest whatever in the suit in the shape it assumed in the amended petition, no claim against the defendants, and no concern in the prosecution of the suit of Miller and McCart. It could not, therefore, be pretended that such an amendment as was proposed by the motion could have changed substantially or materially the claim of the plaintiff, or have affected or prejudiced the defence in any way. And if such an amendment is allowable on the trial, or even after judgment, *a fortiori*, it would seem to be before trial, and before any answer is filed.

The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return, or other proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved. (R. C. 1855, p. 1253, § 3.) In a corresponding provision of the New York code it has been decided that the restriction as to changing the cause of action or defence in matter of substance applies only to cases where the party seeks to amend his pleadings after trial. (*Beardsly v. Storer*, 7 Howard, 295; 11 ib. 170.) But the amendment in the case before us was not proposed after trial; and if it had been, the amendment, not being such as changed substantially the cause of action, should have been permitted even at that stage of the proceedings.

The causes of demurrer under the practice act are, first, that the court has no jurisdiction of the person of the defendant or the subject of the action; or second, that the plaintiff has not legal capacity to sue; or third, that there is another action pending between the same parties for the

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same cause in this state ; or fourth, that there is a defect of parties plaintiff ; or fifth, that several causes of action have been improperly united ; or sixth, that the petition does not state facts sufficient to constitute a cause of action ; or seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action. The causes assigned in the demurrer to the amended petition are, first, that the petition did not show the plaintiffs entitled to any judgment or other relief ; second, that it does not show any joint right of action in the plaintiffs against the defendant ; third, that the petition shows the demand against the defendant to be several and not joint ; and fourth, that there is a misjoinder of parties plaintiff.

It is very obvious that there is but one ground upon which a demurrer to the amended petition could have been sustained, namely, that there were parties plaintiffs who were not necessary parties to a complete determination of the action. But this was the very objection the motion to strike out all the plaintiffs except Miller and McCart proposed to obviate ; and therefore the motion should have been sustained, and the amendment allowed. Why overrule the motion and sustain the demurrer for the same objection that the motion was intended to get rid of, if, indeed, this objection of unnecessary parties was embraced in any of the causes assigned in the demurrer ? If it was not, then the *demurrer* should have been overruled.

The judgment is reversed and the cause remanded ; the other judges concurring.

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BLAIR, Respondent, v. CORBY, Appellant.

1. The admission of testimony that is merely irrelevant is no ground for the reversal of a judgment unless the testimony tends to mislead or prejudice the jury.
2. Questions of variance should be raised at the trial, so that an opportunity for amendments may be afforded.

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3. Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, he may recover the sum agreed upon, including the percentage, of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company.

*Appeal from Buchanan Court of Common Pleas.*

This was an action to recover the sum of \$3,195.89 alleged to be due plaintiff as a balance for work and labor done and materials furnished in constructing and completing certain work upon the Hannibal and St. Joseph Railroad under a contract entered into between plaintiff and defendant in April, 1856. The defendant was a contractor under John Duff & Co. The plaintiff was a subcontractor under defendant. The petition set forth substantially that by said contract plaintiff bound himself to construct and in every respect to complete the clearing, grubbing, masonry and trestle-work and piling, including the furnishing of materials and of all other things requisite and necessary to complete the road-bed of that portion of the Hannibal and St. Joseph Railroad known as section Ten, extending from station 580 to station 641; also the masonry on section Eight, on the west division of said road, at certain specified prices; that for said work and materials defendant was bound by said contract to pay plaintiff eighty-five per cent. in current funds, or in such money as shall be paid defendant by John Duff & Co., upon the estimates made by the engineer in charge of the work, and in ten days from the receipt of the corresponding monthly estimate to said defendant from John Duff & Co., fifteen per cent. thereof being retained as a security for the completion of the work and until the same is fully performed, accepted and finally estimated by the engineer, when the defendant, after the receipt of said retained percentage from John Duff & Co., will, within thirty days thereafter, pay

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plaintiff said amount retained. And said contract contained the further stipulation and provision, that whenever, in the opinion of said engineer, the contract shall have been wholly completed by the plaintiff, the defendant would pay him, and the plaintiff agreed to receive for the performance of said work in full compensation for materials furnished and work done, &c., the prices before specified in said contract; that said work should be executed under the direction and constant supervision of the engineer of the company; that the quantities and amounts of the several kinds of work performed are to be determined by the measurements and calculations of said engineer, which shall be final and conclusive. Plaintiff alleges that he has duly and fully complied with and performed the entire stipulations and conditions of said contract to be by him performed; that he has fully and entirely completed all the work by him to be performed; that said work had been accepted and received and finally estimated by the engineer in charge; that John Duff & Co., more than thirty days before the commencement of this suit, paid to defendant the full amount due upon such final estimate; that defendant had a contract with John Duff & Co. by which he bound himself to complete for them the first division west of the Hannibal and St. Joseph Railroad ready for the ties and track; that before the commencement of this suit the defendant had failed to comply with his said contract, and had forfeited the same and also the fifteen per cent. retained; that John Duff & Co., without completing said first division, surrendered said road into the hands of the company, which has ever since been using and enjoying the work done by plaintiff. Plaintiff also claims compensation for extra work, and asks judgment for \$3,195.89, including \$2,169.57 for the fifteen per cent. retained.

The following are the instructions given by the court at the instance of the plaintiff, and referred to below in the opinion of the court: "6. If the jury believe from the evidence that plaintiff has fully completed and performed the

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work specified in said petition and contract in evidence, and that before the commencement of this suit the same had been finally estimated and received by the engineer of the Hannibal and St. Joseph Railroad Company, or by his assistant or assistants, duly appointed, who were recognized by the defendant as such, and that defendant forfeited his contract with John Duff & Co., then plaintiff is entitled to recover in this action the full value of his work including said retained percentage, unless the same has been paid. 8. Although the jury may believe from the evidence that plaintiff did not fully complete his work by January 1, 1857, yet such failure could not forfeit his contract unless defendant took such steps to forfeit the same as is required by the third section of the contract read in evidence, by giving notice, &c.; and there is no evidence that defendant took such steps or made such attempt."

The following instructions asked by the defendant were refused: "1. By the terms of the contract between plaintiff and defendant read in evidence to the jury, the plaintiff Blair was required and bound to complete the work specified in said contract before the 2d day of January, 1857; and unless the jury believe from the evidence that said work was completed at that time, they will find for the defendant. 2. Unless they believe from the evidence that the work specified in said contract to be performed by plaintiff was completed, accepted and finally estimated by the engineer of the Hannibal and St. Joseph Railroad Company before the commencement of this suit, which was commenced on the 4th day of February, 1858, they will find for the defendant. 4. Unless the jury believe from the evidence that the work specified in said contract to be performed by plaintiff was prior to the commencement of this suit completed, accepted and finally estimated by the engineer of the Hannibal and St. Joseph Railroad Company, and that said work was also accepted by John Duff & Co., they will find for defendant. 11. The fifteen per cent. mentioned in the contract between John Duff



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& Co. and the defendant as stipulated damages in case of the forfeiture of the contract is a penalty out of which John Duff & Co. could have the right to recover such damages as they sustained by reason of such forfeiture. 12. There is no evidence of a forfeiture of defendant's contract with John Duff & Co. or of the retained fifteen per cent. 16. The final estimates on which plaintiff under the contract was entitled to the retained percentage was not the final estimate of the sections mentioned in the petition, but the final estimate of the whole division No. 1 west of the Hannibal and St. Joseph Railroad."

There was a verdict for plaintiff.

*Hall & Loan*, for appellant.

I. The accounts read in evidence should have been excluded. They had no tendency to prove any issue made in the pleadings. They were incompetent for any purpose. The sixth instruction should have been refused. It submits to the jury a question of law, the forfeiture of the contract with John Duff & Co. It authorized a recovery on a case different from the one made in the pleadings. The petition alleges that Duff & Co. paid defendant the full amount due upon the final estimate as well upon the monthly estimates. The instruction authorizes a recovery if the jury believe that defendant *forfeited* his contract. The eighth instruction should have been refused. The plaintiff alleged a performance of the contract, which is denied in the answer; yet in this instruction the jury are required, notwithstanding they find this issue for the defendant, to find their verdict for the defendant, unless they also find that the defendant took the steps necessary to forfeit the contract. The court should have given the first instruction asked by defendant. The plaintiff was required to complete the contract before the 1st of February, 1857. The second instruction should have been given; so the fourth instruction. By the contract, the work was to be at the risk of the plaintiff until it was completed, accepted and finally estimated, and also accepted by

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John Duff & Co. The eleventh and twelfth instructions should have been given. The fifteen per cent. retained was a penalty and not liquidated damages. (11 Mo. 271; 8 Mo. 467.) The sixteenth instruction should have been granted. The fifteen per cent. was by the terms of the contract with Duff & Co. to be retained as a security for the whole work, and John Duff & Co. were not bound to pay it until the whole work on division No. 1 was completed, accepted and finally estimated.

*Vories & Vories*, for respondent.

I. The court committed no error in admitting the evidence objected to by defendant. The court committed no error in giving or refusing instructions. The recovery was for the fifteen per cent. only. The question whether this fifteen per cent. was due was properly submitted to the jury by the instructions. If Corby failed to receive the fifteen per cent. by his own fault in failing to complete other parts of the work to be done by him, by which he forfeited said fifteen per cent., he became liable to pay the deferred payment to plaintiff for the work completed by him. Defendant could not take advantage of his own wrong. The evidence tends to show that defendant received the fifteen per cent. on the work done by plaintiff. It was payable when the plaintiff completed his contract.

SCOTT, Judge, delivered the opinion of the court.

As this case only involves questions as to the admissibility of evidence and the propriety of instructions given and refused, it will be sufficient to notice the points made in the appellant's brief, who was defendant below.

The first error complained of by the appellant is the admission in evidence of sundry accounts between him and the plaintiff in relation to the subject of the suit. As the accounts were made out by the appellant himself we do not see on what grounds they can be regarded as inadmissible against

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him. They contained admissions which were competent evidence for the plaintiff. A judgment will not be reversed for the admission of testimony which is merely irrelevant. Unless the evidence tends to mislead or prejudice the minds of the jury, the fact of its being merely irrelevant is no ground for a writ of error or appeal.

The next error alleged is the giving of the sixth instruction for the plaintiff. It is objected to this instruction that it submitted a question of law to the jury, and that it warrants a recovery on a ground not stated in the petition. There was no question in the [case] as to what facts would constitute a forfeiture; the only matter in dispute was the fact of a forfeiture. We do not understand the petition as only alleging that Duff & Co. actually paid the sum due on the final estimate, but also that it was in effect paid, as the appellant had by his conduct forfeited his right to receive it. Under this view of the petition, we see no error in the instruction. The petition is not as intelligible as it might have been made, but it does not appear that any attempt was made to make it plainer.

The eighth instruction given for the plaintiff is next alleged to be erroneous. That instruction certainly contains a legal proposition. We do not understand it as raising the question, whether, in an action on a special contract to be performed within a given time, under an allegation that such contract has been performed, it would be sufficient that the contract had been performed but not within the stipulated period. A variance between the petition and proof must be made at the trial, so as to enable the plaintiff to amend. We do not see how the question of a variance can be raised in this court for the first time in a case like this. There may be cases where such a variance might affect the merits of the judgment, but this is not one of them.

Complaint is made that the court refused to give the first instruction asked by the appellant. We are of the opinion that the refusal did not prejudice the appellant. The con-

tract was read in evidence without objection. No objection on the ground of variance was made at the time. The party, then, under the circumstances of this case, should not have been permitted to raise it by instruction, when the plaintiff had no opportunity of amending and accommodating his evidence to the amendment. The contract, though not performed within time, was in all other respects considered as binding, the forfeiture for a failure to comply with this stipulation having been waived. We can clearly see that the appellant was not injured by the refusal of this instruction.

The objection to the refusal of the second of appellant's instructions has been answered by what has been already said.

As it appears that the fourth instruction was based on the second specification of the seventh article of the contract, we do not see how its refusal affected the merits of the case.

Whether the fifteen per cent. retained by Duff & Co. by their contract with the appellant was a penalty or not is a matter with which the plaintiff has no concern; nor do we see how the question can affect this case. It seems to be an abstraction. There was no error, then, in refusing the eleventh instruction.

In relation to the retained percentage, it may be remarked that the contract between the appellant and plaintiff contains no reference to the contract between the appellant and John Duff & Co. If the appellant had a contract with Duff & Co., by which they were to retain a percentage as a security for the completion of the entire work, if the appellant sublet to the plaintiff, with a similar clause, a portion of the work to be done by him, and if by reason of the appellant's failure to comply with his contract, not caused by the fault of his subcontractor, he fails to receive the retained percentage, that is no reason, if the subcontractor has performed his work agreed to be done, and it has been received, he should not have the percentage retained under his contract.

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To hold otherwise would be to allow the appellant to take advantage of his own wrong. The plaintiff is entitled to his retained percentage, having performed his contract; and as, by the terms of the contract, he was entitled to it a certain number of days after the appellant had received it, if the appellant has by his own conduct prevented himself from receiving the percentage due him from John Duff & Co., which he was to pay the plaintiff after the receipt of it by himself, under such a state of facts, what can be clearer than that the plaintiff is entitled to recover the percentage retained under his contract? Affirmed.

[END OF JANUARY TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
MARCH TERM, 1860, AT ST. LOUIS.

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DENT, Plaintiff in Error, v. SIGERSON *et al.*, Defendants in Error.\*

1. Under the practical construction given to the laws of the United States previous to 1836, United States surveys, when made and approved by the surveyors general, stood as the authorized governmental surveys until they were set aside by some authority having a right of supervision over the official action of the surveyors general; it was not necessary, in order that a United States survey duly made and approved by the surveyor general should become an authoritative survey, that it should be transmitted to the General Land Office, and receive the formal approval of the commissioner, or of the department to which he was subordinate.
2. Confirmations under the act of Congress of July 4, 1836, do not relate back to the date of the original Spanish grant or concession so as to exclude intermediate grants; they take effect only from the date of the passage of said act.

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\* This and the two following cases were decided at the March term, 1859, of the supreme court. They were held back from publication in order that the dissenting opinion of Judge Scott might accompany the report. This dissenting opinion was filed at the March term, 1860.—[Rer.]



3. The United States survey of the common of Carondelet made by Joseph C. Brown, deputy surveyor, stood as an approved and authoritative survey of the United States in the year 1834; and whether it did or did not relate back to the inception of the title to common under the act of Congress of June 13, 1812, still the title of Carondelet to the land embraced within said survey as common is superior to and must prevail over a title emanating from the United States by virtue of a confirmation under the act of Congress of July 4, 1836.

*Error to St. Louis Circuit Court.*

The facts in evidence are sufficiently set forth in the opinion of the court. The following instructions asked by the plaintiff were refused:

1. If the jury believe from the evidence that there was no grant, concession or survey of any land south of the river Des Peres as commons for the village of Carondelet, nor any use of land there for that purpose, under and by the authority of the Spanish government, then the act of Congress of June 13, 1812, and of 1831, did not confirm any land there as commons.

2. The reply of Zenon Trudeau to the petition of Gamache dated December 7, 1796, given in evidence by plaintiff, is no grant or concession of any land to the inhabitants or village of Carondelet for commons.

3. The jury are instructed that there is no evidence of any use of any land south of the river Des Peres as commons, under and by authority of the Spanish government, by the inhabitants of Carondelet prior to December 20, 1803.

4. No grant, concession or order of survey of any land south of the river Des Peres as commons for the village of Carondelet having been shown, nor any use of land there as commons, and the survey of the United States of said commons not having been finally approved by the United States until the 23d day of February, 1855, the jury are instructed that the confirmation of the claim of Gabriel Cerré by act of 4th of July, 1836, and surveyed by the United States as United States survey No. 3067, is a better title to the land within the limits of that survey than any derived from Carondelet.

5. If the jury find from the evidence that Gabriel Cerré, or those claiming under him, inhabited, cultivated or possessed a tract of land of ten by forty arpens conceded to said Cerré on the 15th of March, 1789, or some portion thereof claiming the whole, in the year 1796 and prior to the 20th of December, 1803, and that the same land was confirmed by act of Congress of the 4th day of July, 1836, and surveyed by the United States as survey 3067, then the said confirmation and survey are a better title to the land within the limits of said survey than any derived from Carondelet shown in this case.

6. The jury are instructed that as no grant, concession or survey under the Spanish government for any lands as commons for the village of Carondelet south of the river Des Peres has been shown, and as the survey of the commons of Carondelet was not finally approved by the United States until the 23d day of February, 1855, the claim of Gabriel Cerré, confirmed by the act of Congress of 4th July, 1836, and surveyed by the United States as survey No. 3067, is a better title to land within the said Cerré survey than any derived from Carondelet, unless the jury should find that the land within the limits of said Cerré survey was used as commons by the inhabitants of Carondelet prior to the change of government.

7. The jury are instructed that the confirmation to Gabriel Cerré by act of July 4, 1836, and the survey thereof by the United States as survey No. 3067, conveys a better title to the land within the limits of that survey than any derived from Carondelet, unless the jury should be satisfied from the evidence that the inhabitants of said town used the land within the limits of said survey prior to the change of government as commons of said town and subsequent to the date of said concession to Cerré.

8. The survey given in this case, the certificate of which bears date the 8th of October, 1855, is the only valid and subsisting survey of the commons of Carondelet, and by the terms of the approval of said survey it can have no force or

effect against the rights of those deriving title under the confirmation to Gabriel Cerré by the act of Congress of 4th July, 1836, and survey of the United States No. 3067 of said Cerré's confirmation; and, as the claim of the inhabitants of the town of Carondelet as filed before the recorder of land titles and exhibited before the board of commissioners was for six thousand arpens in quantity and not by extent or boundary, if the jury find from the evidence that said concession in evidence was granted on the 15th day of March, 1789, by Lieut. Governor Perez, and that the land embraced therein was inhabited, cultivated and possessed in the year 1796, and afterwards prior to the 20th day of December, 1803, (or some part thereof claiming the whole,) by Gabriel Cerré or those claiming under him, and that said land was confirmed to said Cerré or his legal representatives by act of 4th July, 1836, and surveyed by the United States as survey No. 3067, then the jury are not authorized to find that said land is any portion of the land confirmed to the inhabitants of Carondelet as commons.

9. The surveys of the Carondelet commons as made by Rector and Brown were disapproved by the commissioner of the General Land Office and by the proper authorities of the government of the United States; and if the jury find from the evidence that the final approval of the said surveys of Brown and Rector, by the Secretary of the Interior in 1855, excluded from said surveys 1702.04 acres of land reserved for the use of the military post at Jefferson Barracks—and further provided that the parties claiming adversely to Carondelet should not be hindered, by reason of said survey, or the approval thereof, from establishing and settling their right before the judicial tribunal of the country—and that the survey made under the said final approval of said surveys expressly declared that, as regards the rights of all other claimants within the limits of said survey of the commons aforesaid, who hold adversely to Carondelet, should not be construed to interfere with the rights of such adverse claimants to seek a judicial settlement of their several interests—

and if the jury further find that plaintiff was an adverse claimant to Carondelet of the premises in question under the grant to Gabriel Cerré—and that said grant was confirmed to the said Gabriel Cerré and his legal representatives by the act of July 4, 1836—and that a survey thereof was made by the United States embracing the premises in question in the year 1838 and duly approved—and that said Cerré possessed, inhabited or cultivated the said tract of land, or any part thereof claiming the whole, prior to the 20th day of December, 1803—then the surveys of Rector and of Brown of the land claimed as commons for Carondelet south of the river Des Peres are not, nor are either of them, conclusive against the plaintiff; and unless the jury find from the evidence that the inhabitants of Carondelet used or possessed the premises in question prior to the 20th of December, 1803, as commons belonging or appertaining to said village of Carondelet, the plaintiff is entitled to recover in this action.

10. The survey of the Carondelet commons made under the final decision of the Secretary of the Interior of 1855 is not conclusive against the claim of the plaintiff under the confirmation of 1836 and the survey of 1838; and if the jury find from the evidence that plaintiff was an adverse claimant against Carondelet of the premises in question, under the grant to Gabriel Cerré, and that said Cerré inhabited, cultivated or possessed the said tract of land, or any part thereof claiming the whole, prior to the 20th day of December, 1803, then the plaintiff is entitled to recover, unless the jury further find from the evidence that the inhabitants of Carondelet used or possessed the premises in question prior to the 20th day of December, 1803, as commons belonging to or appertaining to said village of Carondelet.

11. If the land in the possession of defendant at the commencement of this suit was part of a tract of land conceded to Gabriel Cerré on the 15th day of March, 1789, by Lieut. Governor Perez, and that claim to said tract was confirmed to Gabriel Cerré or his legal representatives by act of Congress of July 4, 1836, then the title under said confirmation

is a superior title to the land thus confirmed to any derived under the inhabitants of Carondelet, unless the jury should find that said tract became vacant land prior to December 7, 1796.

12. If the jury find from the evidence that the premises in question, or any part thereof under claim for the whole tract, was inhabited, cultivated or possessed prior to the 20th day of December, 1803, by Gabriel Cerré, under the grant to him of 1789, or otherwise, then the inhabitants of Carondelet did not become vested with any title to the same land as commons belonging to said village, unless prior or subsequent to said inhabitation, cultivation or possession of Cerré, they used or possessed the same premises as commons belonging to or appertaining to said village prior to the 20th day of December, 1803.

13. The certificate of Soulard dated in 1806, read by defendant from transcript of the claim of Carondelet as presented before the board of commissioners, is no evidence of the facts as therein stated.

14. The testimony of witnesses for defendant as to declarations of deceased persons relative to the extent of the claim of commons and use of the land for the same is no evidence of title in this case, nor that the land was passed by the confirmation of the act of 13th June, 1812, nor any evidence of an inchoate title such as was confirmed by the act of 1812.

15. The confirmation of the claim of the inhabitants of Carondelet to commons, as presented to the board of commissioners, is not more *extensive* than the claim; and if the claim to the six hundred arpens as asserted before the board of commissioners can be satisfied without interfering with the land claimed before the board by Gabriel Cerré, and afterwards confirmed by act of Congress of July 4, 1836, then the plaintiff is entitled to recover for such land as he may have proved the defendants to have been in possession of at the date of this suit within the limits of the United States survey of said confirmation given in evidence by plaintiff.

16. Actual, open, notorious, adverse possession of a tract



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of land, or parcel of the same, for twenty consecutive years, claiming to own the same, vests an absolute title in such possessor to the land so possessed. If the jury find from the evidence that the plaintiff has had such possession of the premises sued for, for twenty consecutive years ending at any time within twenty years before the commencement of this suit, they will find for the plaintiff.

17. If the jury find from the evidence that the plaintiff entered into a part of the tract of land of four hundred arpens known as the Cerré tract under a claim of title thereto by a recorded deed from Gallatin to him, his entry and possession are referred to such title, and he is deemed to have a seizin of the land coextensive with the boundaries stated in the said deed, unless there is an open, adverse possession of some part of said land so described in some other person. Therefore, if the jury find from the evidence that the plaintiff entered into said premises after the execution of said deed, and actually occupied a part thereof, in person or by his tenants, claiming to own the same, for twenty consecutive years, claiming the whole of said tract, and that such possession was open, notorious and adverse to all persons, then the jury will find for the plaintiff.

The defendant asked the court to give the jury the following instructions: "1. The inhabitants of Carondelet were confirmed in their claim to commons by the act of Congress of 1812 and 1831. 2. The notice of claim of said inhabitants, as filed with the recorder of land titles and exhibited before the board of commissioners, is evidence of the extent of the said claim to commons. 3. If the claim of the plaintiff is included within the boundary of the lands confirmed to the town of Carondelet by the acts of 1812 and 1831, then the jury must find for the defendants, because those acts passed the title to the land in controversy to the inhabitants of said town. 4. The said acts of 1812 and 1831, and the survey of the commons of Carondelet exhibited here to the jury, are equivalent to a patent for the lands included within such survey. 5. The survey of the commons of Ca-



rondelet made in 1817 by Rector is a legal and valid survey of the said commons. 6. The resurvey of the said commons as made by Joseph C. Brown retracing Rector's lines, and approved by Elias T. Langham, surveyor general for Missouri, was a legal and valid survey, and located the land confirmed by the acts of 1812 and 1831 to the inhabitants of Carondelet. 7. The survey of the commons of Carondelet having stood legally approved at the passage of the act of July 4, 1836, the plaintiff took no title to any land by virtue of his confirmation, but had merely a right to locate the same quantity of land upon the public domain. 8. The documents read in evidence by the defendant are evidence to show the extent and location of the claim of Carondelet to commons at the dates of said documents respectively. 9. If under the Spanish government and down to June 13, 1812, the inhabitants of Carondelet had used and claimed the land since surveyed as commons, such user and claim is evidence of the extent of the claim as confirmed." The court refused to give these instructions.

The court, on its own motion, then gave the following instruction: "If the land in controversy is within the survey of the commons of Carondelet made by Rector in 1817 and that made by Brown in 1834, the plaintiff is not entitled to recover in this action." This was the only instruction given — all instructions offered on either side being refused.

The jury found for defendant.

*H. R. Gamble, Shepley, and B. A. Hill*, for plaintiff in error. Mr. Shepley, in a written brief, presented the following points:

1. As to those portions of the common of Carondelet not included within the Barracks reservation and the confirmations and surveys under the act of July 4, 1836, I admit the title of Carondelet is perfect, and the United States and Carondelet are both estopped to deny that, excluding those portions, the survey is conclusive of the boundary and extent of the commons. The question is, what is the condition of

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those portions confirmed by the act of 1836, and surveyed shortly afterwards, and incidently of the Barracks tract? Carondelet released only a portion of the 1702 acres reserved, and which is expressly excluded by the Secretary of the Interior in 1855. Up to the approval of Brown's survey, October 8, 1855, there was no valid approved survey of the commons of Carondelet; as far as the land in controversy is concerned, Carondelet is in no better situation now. The land was already confirmed and surveyed to us. The question whether a survey is approved and when and how, and whether at any time it is a valid and subsisting survey, is a question of law to be determined by the court.

II. The evidence conclusively showed that the field notes made by Rector in 1817 were not a survey of any confirmation of commons. There was no authority at that time to make any such survey; no instructions ever issued. It was a loose scrap of paper not signed by any one. It was never paid for. It was imperfect; it never could have been examined and approved. There was no plat accompanying the field notes, and no plat ever made in the surveyor general's office. It was made to subserve a private purpose. It has never been set up as a valid survey until the question arose as to whether the action of the government in disapproving Brown's survey was done in a reasonable time. It differs in many particulars from Brown's survey, and Brown's is the only survey that is or ever was recognized as a subsisting survey. It never was sent to the commissioner of the General Land Office, and never referred to in the correspondence between the surveyor general and that office. Part of it was sectionized.

III. The surveys made and returned to the office of the surveyor general are subject to the supervision and amendment of his superior at the seat of government. (1 Land Laws, p. 11, 50, 70, 96, 104, 132, 189, 211, 278; Act of July 4, 1836; *Menard v. Massey*, 8 How. 294; *Guitard v. Stoddard*, 16 How. 512.)

IV. That control was exercised. Brown's survey was dis-

approved of by the department at Washington in 1853; and as Brown's survey never has been approved, it was exercised in a reasonable time, within a few months after the plat was returned to the Land Office. From 1839 there has been a steady resistance on the part of the department against allowing that survey to stand in its integrity. In 1853 it stood as a rejected survey by the tribunal of last resort.

V. The present approved survey of Carondelet is not an approved survey so far as the Jefferson Barracks tract and the interferences with confirmations are concerned. It includes within its lines the Barracks tract and the confirmed claims. A controversy is still going on and unsettled as to a portion of the reservation of the Barracks tract. The conveyance made by Carondelet omitted a considerable part of the tract. The effect of the present survey, as it stands approved, is precisely as if the Secretary of the Interior had directed the surveyor general to run the lines so as to leave out the Jefferson Barracks tract and the confirmations. That evidently was the intention in effect; but as, in practice, it could not be effected, owing to some of the confirmations being in the midst of the tract which the United States were willing to give to Carondelet, the only thing that could be done, and give to Carondelet the title to that about which there was no interference, was to make it general and except out certain tracts from its effect.

VI. Even if the legal effect of the approval be to set up Brown's survey as the survey of the Carondelet common without exception or exclusion of any tract within its limits, yet it is an approved survey only from the 8th of October, 1855; and as the United States had previously confirmed and surveyed the Cerré claim, that is the superior title.

VII. The evidence of the old witnesses as to what they had heard as to the extent of commons of Carondelet was not competent testimony. So the instruction in relation to the effect of cultivation and possession by Cerré prior to December 20, 1803, ought to have been given. There is no

proof, and scarcely any pretence of proof, of any grant or survey or even recognition of commons south of the river Des Peres under the former government.

*B. A. Hill* also presented and discussed the following points in behalf of plaintiff in error :

I. The title of Carondelet is claimed under the act of 1812, and there being no evidence of any user or grant south of the river Des Peres, the only claim of Carondelet to this land arises under a survey of 1834 by Brown, deputy surveyor of the United States.

II. This survey was not approved by the surveyor general until 1839, and it was disapproved the same year by the commissioner of the General Land Office ; and upon appeal, it it was again disapproved in 1853 by the Secretary of the Interior.

III. The survey had no further force or effect after this disapproval, and the land confirmed to Cerré in 1836 and surveyed for him in 1841 was appropriated by force of the act of Congress of 4th July, 1836, for the benefit of Cerré's legal representatives.

IV. The subsequent approval of the survey of the commons by McClelland in 1855 is not an approval of Brown's survey of 1834, but excepts several thousand acres of land from it. It does not relate back to the survey of 1834, for it is not the same survey, and the Secretary of the Interior had no power to reverse the decision of his predecessor made in 1853. The reversal of Stuart's decision of 1853 and the attempted restoration of Brown's survey by McClelland in 1855 was fraudulent and void.

V. The effect of a survey works by estoppel. The United States was not bound by this survey in 1841, when Cerré's confirmation was surveyed, and the claims of the parties must be determined according to the relative merits of their Spanish titles. If the United States had not located this land under the laws of the United States, then it was subject to location under Cerré's confirmation ; and having been

located, the defendants have no title, and plaintiffs should recover.

V. The Spanish title of Cerré is clearly superior to the commons' title, and can only be defeated by a prior location for the commons by the United States. There has been no such prior location.

*Whittelsey*, for defendants in error.

I. The survey of the commons of Carondelet made by Rector was a legal and valid survey binding upon the United States and those claiming under them by subsequent grant. It was made by authority of law. (1 Land Laws, 50, 70, 90, 104, 112, 115, 119, 121, 122, 128, 132, 138, 153, 166, 176, 180, 189, 211, 216, 230, 242, 255, 278, 280, 385, 397, 552; 8 How. 301, 317; 17 How. 415; 4 How. 456; 18 Howard, 473, 43; 19 How. 79; 9 How. 333.)

II. Waiving the effect of Rector's survey of 1817, the survey of Joseph C. Brown (retracing Rector's lines) was officially approved July 29, 1834, by surveyor general Langham, and was therefore a valid and binding survey. This stood undisputed until 1839, when the War Department began to oppose it on account of the reservation for Jefferson Barracks being included in the survey. (4 How. 169; 9 How. 333; 18 Mo. 43; 19 Mo. 334, 342, 79; 8 How. 317, 301, 313.) Prior to July 4, 1836, the department at Washington had no authority to supervise the action of the surveyor general in the survey of private claims. (1 Land Laws, 552, 278; 9 How. 333; 18 How. 43; 9 Mo. 323, 804.)

III. The act of Congress of Jan. 27, 1831, supplemental to act of June 13, 1812, relinquishing to the inhabitants of the villages named, was of itself, as against the plaintiff's claim under the act of 1836, a confirmation by metes and bounds, as the commons were then surveyed. (6 Rob. La. 139; 4 How. 456.)

IV. The documents offered in evidence by defendant were evidence that a grant of commons had been made to Carondelet. The reputation among old witnesses, deceased, as to



the extent of commons under the Spanish government, and especially as to its use in the olden time, was good evidence. (1 Greenl. Ev. 166, 168, 139, 175, 145; 1 M. & S. 97; 1 Stark. Eq. 29; 5 Cow. 315; 2 Ad. & El. 171.) The plaintiff can not claim title by virtue of the statute of limitations as prayed in the sixteenth and seventeenth instructions. (Reilly v. Chouquette, 18 Mo. 221.) He can not claim title under the first section of the act of June 13, 1812. The land sued for was not an out-lot, common field lot or village lot. Cerré was not an inhabitant of Carondelet.

V. The approval of Brown's survey by the Secretary of the Interior in 1855 had the effect not to make said survey valid as from the date of his approval, but to declare that it was a valid survey when approved by Langham July 29, 1834, and that full force and credit should be given to it as such; and also to declare that the survey of Rector was a valid and subsisting survey as approved in 1817. Admitting that the approval of the Secretary of 1855 gave effect to the survey as of a new survey of that date, the case will not be altered; for the defendants have the elder title, and the survey is not the grant of title, but simply the evidence of location or description of the land granted, and of course relates back to the date of the confirming act. (4 How. 456; 10 How. 348; 14 How. 513; 19 How. 79; 10 How. 348.) The defendants have title by act of June 13, 1812.

NAPTON, Judge, delivered the opinion of the court.

The controversy we are called upon to determine in this case is one of long standing, and involves facts and legal principles concerning which there has been for many years much variety of opinion, both in the department of the federal government and the judicial tribunals, whose action upon it has been invoked.

The conflicting titles in the case are that of the inhabitants of Carondelet to commons, and a claim of Gabriel Cerré lying within its supposed limits. The title of Carondelet to her



commons originated in 1812; that of Cerré took its origin, for all purposes now material to be regarded, from an act of Congress passed in 1836. A survey, purporting to be a designation of the Carondelet common, was made anterior to 1817, and subsequently retraced in 1834. That of Cerré's confirmation was made in 1837.

It is manifest that the title of Carondelet is the better title, unless its locality, as fixed by the two surveys alluded to, can be disturbed. The whole controversy, therefore, turns upon the surveys.

On the part of the claimants under Cerré, it is insisted that Rector's survey, which was made previous to 1817, was unauthorized by law, or by the orders of his principal; that it was a private and unofficial survey and was never approved; and that Brown's survey in 1834, which purported to be a resurvey of Rector's, was disapproved and set aside by the executive department of the government which had the supervision of this branch of the public service; and that its ultimate approval in 1855 was conditional and qualified, and gave the title based on it no efficacy in opposition to that of Cerré. If these propositions can be maintained, it must follow that the claimant under Carondelet is not entitled to recover.

We do not think it necessary to determine, in this case, whether the commissioner of the General Land Office, prior to the act of July 4, 1836, could legally exercise any supervision or control over the surveys executed and approved by the surveyor general of Illinois and Missouri. Such a power may be very proper, perhaps necessary, to the performance of the duties confided to that bureau by the act of Congress which established it in 1812. Although no express provision has been found giving the land office or its commissioner such control, it may be a necessary implication from powers which were expressly given. As the conclusion we have reached is not inconsistent with the concession of such a controlling and revising power in the commissioner, we have not deemed it necessary to examine the subject more

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particularly. No such power was attempted to be exercised in reference to Rector's survey. There is reason to believe that it never was contemplated by any of the acts of Congress concerning the public surveys, nor by any practical construction of them either here or in the department at Washington, that a survey, duly and legally made and approved by the surveyor general here, of a private claim had, as a matter of course, to be transmitted to the general land office, and receive the formal approval of the commissioner, and of the department to which he was subordinate, before it could be regarded as an authoritative survey. On the contrary, under the practical construction of the laws previous to 1836, both here and at Washington, the survey, when made and approved by the surveyor general, stood as the authorized governmental survey until it was set aside by some authority having a supervision over the surveyor's office. As Rector's survey was never attempted to be disturbed by any one, or at any time, so far as this record shows, until it became merged in Brown's in 1834, and was recorded in the office as the government survey, it can be nowise important to inquire whether it could have been set aside, if proper steps had been taken for that purpose. We speak of it now as a survey *de facto*, as practicably approved and acted on. Whether it was legally null for want of authority in the officer to make it is another question, which we proceed to consider.

The act of April 29, 1816, (1 Land Laws, 278) expressly made it the duty of the surveyor "to cause to be surveyed the lands in the said territories, [Illinois and Missouri,] the claims to which have been or hereafter may be confirmed by any act of Congress, which have not already been surveyed according to law." Rector's survey, it appears, was in the office of the surveyor general at St. Louis in 1817. Whether made prior or subsequent to the passage of this act does not appear. In our view, it is immaterial; for as the act of 1816 required the survey to be made, even if no law previous to that did, it was not necessary for the surveyor to cause a new

survey where one already existed which met his approval. In the absence of proof to the contrary, the presumption is that the officer has done his duty ; and if no survey was authorized before the act of 1816, we would presume that a survey found in the office in 1817, and recognized there as an official act, was made at a time when the law permitted it. Rector's survey can not then be regarded as a mere private and unauthorized survey. It appears that the surveyor general, under whose administration it was made, approved it in the only mode then customary in his office, and that it was treated as an official survey by those who at that time and subsequently had control of this office. The presumption is that it was made in conformity to directions and instructions from the officer who sanctioned it when it was reported to him.

No particular importance is attached to Rector's survey, so far as the decision of this case is concerned, except as it constitutes the basis of Brown's survey in 1834. This last survey was unquestionably authorized by law, and made under instructions issued by the proper authority. Brown was directed to retrace Rector's lines, and to connect them with the public surveys. It can be of no consequence to inquire whether Brown's survey, made under these instructions, did in all respects conform to them, for, besides that the surveyor general and all the departments having control over the subject did not complain of the correctness of Brown's survey in this respect, it is evident that so far as the Cerré claim is concerned, it is immaterial which survey is regarded as the true one, as either will undoubtedly embrace the confirmation.

For five years this survey remained in the office at St. Louis as the approved survey of the Carondelet commons, and regarding Brown's survey as a mere resurvey of Rector's, it had stood as the approved governmental survey for twenty-two years before any effort whatever, on the part of individual claimants or government officers, was made to disturb it.

In 1839, after this survey had thus been recognized for nearly a quarter of a century by the surveying department, and had been apparently acquiesced in by those supervising tribunals who possessed the power, if they had thought proper to exercise it, to set it aside, it seems that the War Department became alarmed about their title to a military post which had been established at Jefferson Barracks within the limits of this survey, or at all events thought it expedient to appropriate a considerable tract of land, including that post, for the convenience of the government, and entertained apprehensions that the title of the inhabitants of Carondelet might prove an obstacle to this appropriation. At what time, or by what authority, this post was first established there is not shown by any document in the record; nor is it material, for it will be seen in the sequel that the government succeeded not only in securing their title to the enclosures around the post, but to 1702 acres of land which were laid out and surveyed around it. The title to this tract cuts no figure in this case; it is merely alluded to as showing the origin of the inquiry, which, in 1839 or 1840, was instituted into the legality and propriety of the two surveys of Rector and Brown. The attention of the Land Office was in this way directed to the subject, and the district attorney for Missouri, and the Solicitor of the Treasury, and the commissioner of the General Land Office, all concurred, on the first suggestion of the matter, that "Brown's survey embraced several thousand acres of land to which Carondelet had no legal or equitable title." This sentence was a summary one; but it was never executed. From this period, for a succession of years, a discussion was carried on between the department at Washington and the surveyor general here, which it is unnecessary particularly to notice. For a short period the inclination of the Land Department seemed to be adverse to the Carondelet title and to the survey which the government had furnished as evidence of its locality. The government secured her tract of 1702 acres for the Barracks, and a portion of the land south of the Des Peres

was actually entered or preëmpted at the land offices of the district although against the express orders of the department at Washington.

An examination of this correspondence will show that all the surveyors general, from the date of Rector's survey until the conclusion of the dispute, including Wm. Rector, Langham, McCree, Dunklin, Spalding, and Milburn, uniformly maintained the integrity of Brown's survey, and pronounced it official and binding. The recorder of land titles concurred in this view when officially called upon for his action; nor did the heads of departments and bureaus at Washington concur in a different view. On the contrary, with the exception of the officers who first took up the subject in 1839 or 1840, and the Secretary of the Interior in 1853, they also regarded these surveys as authoritative, and declined to disturb them.

It is not deemed important to refer particularly to this official correspondence, except so far as it may be necessary to ascertain what has been the action of the government in relation to these surveys.

In 1841, the solicitor of the treasury (McRoberts) makes a communication on this subject to the Land Office, reviewing and examining the title of Carondelet, and after pronouncing an unfavorable opinion of its merits and recommending 1702 acres to be surveyed and reserved for military purposes, and after designating a specific extent of the survey which he supposed sufficient to satisfy the claim of Carondelet, which he regarded as limited by the quantity originally claimed before the old board of commissioners, he advises a subdivision of the remaining part of the tract with a view to its sale at auction as public land. In this report and recommendation the commissioner (Whitcomb) concurred. The Barracks tract was accordingly surveyed; portions of the remainder were ordered to be subdivided and sold; and, subsequently, but after this order was countermanded, some of the land was permitted to be entered at the Land Office; but in September, 1845, the then commissioner



(Shields) came to the conclusion that it was inexpedient to direct the survey of these lands included within the survey of the Carondelet common. In November, 1846, the same officer, in an official communication, says: "I deem it inexpedient to interfere in any manner with the survey of that common (Carondelet) as originally made by Elias Rector prior to 1817, and retraced by Joseph C. Brown, deputy surveyor, in March, 1834, more especially as the surveyor general, in a certificate to a plat of this common dated April 15th, 1840, has reported to this office that under an act of the legislature of the state of Missouri, passed in pursuance of the act of Congress approved January 27, 1831, the corporate authorities of the town of Carondelet laid off into small tracts the land within Brown's survey of the Carondelet commons, except a portion around Jefferson Barracks, and disposed of the same, or the greater part thereof, to private individuals." The commissioner concludes his communication by saying: "I would recommend, in view of all the facts, that the claim of the town of Carondelet to the whole common as surveyed by Joseph C. Brown in 1834 be confirmed, reserving as much as may be necessary and proper for the United States post at Jefferson Barracks and all valid interferences."

In 1848 another commissioner (Young) declared, substantially as Gen. Shields had done, that "it would be inexpedient to interfere in any manner with that survey."

In 1852, the commissioner (Butterfield) makes a careful examination of the subject, and his conclusion is as follows: "On a full examination of this matter, I find that the proceedings of solicitor Burchard and commissioner Whitcomb were received in September, 1845, by commissioner Shields, who, by letter of the first of that month to the surveyor general, stated that he had refused an application for the survey of a part of the Carondelet commons directed in 1841; and, in a letter of February 14, 1846, to the Hon. J. W. Tibbatts, stated that he deemed it inexpedient to interfere in any manner with the survey of that common as originally made by



Elias Rector prior to 1817, and retraced by Joseph C. Brown in 1834; that the lands within Rector and Brown's surveys are not subject to preëmption or ordinary entries, &c., &c. This course was adhered to by acting commissioner Piper and commissioner Young, and has not since been departed from. As the decision of the solicitors and the instructions of commissioner Whitcomb *were not executed, I regard them as overruled* by the subsequent action of commissioners Shields, Piper and Young, and by the action of the three last named of my predecessors. *It has been settled that this office must not disturb or in any manner interfere with the afore-said survey by Brown, unless Congress shall otherwise order by further legislation; but that said survey is subject to such adverse valid rights* as may exist under confirmed private claims, and also to the right of the United States to the military reservation," &c. "I therefore regard this office, under existing laws, as having no further power or control over the subject."

In the same year (1852) the commissioner of the General Land Office (Wilson) examines the subject somewhat at large; considers both surveys official and valid, and declares "that the United States, by these proceedings, have parted with the fee in the land, and any question of conflicting interest in them is, in my opinion, purely a judicial one, and in which the executive can now properly exercise no control."

In 1853, the Secretary of the Interior disregarding these opinions, directed a new survey; but, before any definite action was had, his successor finally in 1855 settled the question in favor of noninterference. After reciting the history of the official proceedings relative to these surveys, and the acts of Congress and decisions of the supreme court supposed to bear upon the subject, the Secretary says: "In view, therefore, of all the facts and circumstances in this case, and of the opinions expressed by the highest tribunal known to our laws, I am compelled to the conclusion that, as the surveys of 1816 and 1834 were executed by competent

*authority, were duly approved, and were for a series of years acquiesced in by the inhabitants of Carondelet, both the government of the United States and the inhabitants of Carondelet were estopped and concluded thereby. My decision therefore is, that the survey of 1816 or 1817, as retraced by Joseph C. Brown in 1834, should be sustained, excluding, of course, the 1702 acres heretofore set apart and reserved for the use of the military post at Jefferson Barracks; and that the parties claiming adversely to Carondelet should not be hindered thereby from establishing and settling their rights before the judicial tribunals of the country."*

Thus, it will be perceived that the department at Washington in 1855 returned to the point from which they had started in 1839, except so far as the military reservation was concerned, and to secure which had been from the beginning the principal cause of anxiety. Rector and Brown's surveys were declared to have been executed by competent authority, to have been duly approved, and to have been acquiesced in by both the government and Carondelet for a series of years sufficient to conclude them both; conflicting claims were left to the decision of the courts.

In the discussion of this case it was urged, on behalf of those who claim under the Cerré confirmation, that this decision of secretary McClelland is not an approval of Brown's survey in its original entirety; that it distinctly and expressly excludes the tract of 1702 acres retained as a military reserve, and that it also, in the same manner and to the same effect, excludes the private claims; that this survey is therefore no evidence against those who claim under the confirmations of 1836.

We do not concur in this interpretation of the secretary's language and meaning. It is true that great care is manifested in particularly excluding the military reserve of 1702 acres from the survey. The validity of such an exclusion is not a matter which is a subject of inquiry here; and it appears from the official correspondence in the record that Carondelet had conveyed all her title to this reservation, if

she had any, to the government. But the language employed by the secretary in relation to private claimants is totally different from that used in relation to the military reservation. He sustains the survey, "excluding, of course, the 1702 acres," &c.; but he does not exclude any other tract from the survey. He expresses the opinion that "the parties claiming adversely to Carondelet should not be hindered thereby from establishing and settling their rights before the judicial tribunals." Had the secretary entertained a design of excluding any private claim from the survey he would surely have specified it as he did the tract of 1702 acres, or so described it, or the class to which it belonged, as to have made its ascertainment easy. No private claim is referred to by the number of the survey, or the name of the claimant, or the character of the claim. The terms employed in speaking of adverse claims are broad enough to include, not only those of Spanish origin already located by survey, but such as never had been surveyed. They would also embrace pretensions originating under the present government, and might be construed to include mere trespassers. A possession, with a claim of title, makes a party as much an adverse claimant, and sometimes quite as formidable a one, as an inchoate title under the Spanish government. We can find no line of discrimination at which this asserted exclusion is to cease; and according to this construction of the secretary's decision, the survey could be of little, if any, use to Carondelet, seeing that whenever a controversy exists it can be of no avail, and when there is no controversy she can do very well without it.

It was not the intention of the executive, as we think, to give any such approval, or rather disapproval, of Brown's survey as has been contended for. The exception or reservation of the rights of private claimants was merely an expression of opinion, similar to those previously expressed by the heads of the land department, that the survey was "subject to such adverse valid rights as may exist under confirmed private claims," and that "any question of conflicting inter-

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est in them was purely a judicial one, in which the executive could properly exercise no control."

Regarding this decision in 1855 as settling the action of the government in relation to the validity of Brown's survey, it remains to be considered at what date the survey is to be held as a designation of the land by the government. It will be understood, from what has been already said, that we do not consider the determination or decision of the department in 1855 in the character of an original approval of a survey. It is rather viewed simply as a final conclusion on the part of the executive of the United States, through the proper department, that the survey should not be disturbed; that its previous approval by the surveyor general, under whose directions it was made, and by his successors, and by former commissioners of the Land Office, should stand. Conceding the right of the commissioner of the Land Office, even prior to 1836, to revise the surveys approved by the surveyor general, we do not understand, as before observed, that the acts of Congress on this subject, either in their letter or spirit, or in the practical construction they have received, require a survey to be regarded as incomplete until it receives the final and formal approval of the commissioner and the department of the Interior to which he is attached. Many of the private surveys, particularly those made under the act of 1815 concerning New Madrid certificates, reached the Land Office only through the medium of the recorder of land titles; and the laws have not made it a prerequisite to their validity that they receive the formal sanction of all the bureaus and departments through which they may, if contested, have to pass. Such a construction of the law would lead to great embarrassment in the land titles depending to some extent upon these surveys. Great inconvenience and practical injustice, we apprehend, might result from holding that a survey, which has stood for years as the authoritative governmental survey in the office of the surveyor general, can at the instance of an adverse claimant be taken up, and, although its investigation results in no action unfavorable to its validity,

may be held to take date only from the time of this final determination of the department in the last resort. A title in this way may be postponed, until those who have an interest in keeping up a protracted controversy about it have succeeded in procuring a survey favorable to themselves. A judgment appealed from is nevertheless a judgment until it is reversed; and if not reversed at all, all acts done under it and all liens acquired by it stand good from the date of the judgment. The survey of Brown was an approved survey in 1834, and the appeal from its approval in 1839 having been dismissed it stands as a survey of that date.

We do not consider it important to express any opinion as to the effect of the secretary's exclusion of the tract of 1702 acres reserved for the military post at Jefferson Barracks. The government of the United States and the inhabitants of Carondelet being agreed about this, it is not a matter for third persons to contest. We are not called upon to say whether this reservation could of itself have any effect or not; nor is there any thing in this record to show the history of this title.

In relation to the alleged discrepancy which is said to exist between Brown and Rector's surveys, it is sufficient to observe that the government of the United States has acquiesced in Brown's, which is said to embrace more land than the other; and the confirmation to Cerré's representatives is within either.

Our conclusion is, then, that Brown's survey, being a legal and approved survey in 1834, must prevail over a title emanating from the United States two years afterwards.

In *McGill v. Somes & McKee*, 15 Mo. 87, this court held that "when a survey is made and passes through the examination and receives the sanction contemplated by law, it is conclusive on the government. It is in like manner conclusive upon all persons who claim title to the land under titles originating subsequently to the survey.

It is no longer a question that confirmations under the act of July 4th, 1836, do not relate back to the date of the



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original Spanish concession so as to exclude intermediate grants, but that they take effect only from the passage of the act. The confirmation of the Carondelet commons was made by the act of June 13, 1812, and the location by a survey made at least as early as 1834. "These laws," (the acts of 1812 and 1831) says Mr. Justice Catron in *Le Bois v. Brammell*, 4 How. 464, "and the acts done by the United States in pursuance of them, we suppose, made and located the commons title as effectually as a patent could have done, and brought it within the exception of the act of 1836." In *Menard v. Massey*, 8 How. 293, the entries and patents of Massey in 1826 and 1827 prevailed over a confirmation under the act of 1836.

We are not to be understood as deciding that the survey of 1834 would not relate back to the incipency of the title in 1812. There is a class of confirmations, such as were passed upon by the Supreme Court of the United States in *Cochran v. West*, where the grant was indefinite, and its confirmation was accompanied with an order of survey, in which the title would of course take date only from the date of the survey. The title to commons confirmed by the act of 1812 is not of this class; but if it was so regarded, still, as it was located two years before the date of Cerré's confirmation, it must prevail. Nor is it to be understood, because the date of Rector's survey has not been adopted as the date of the Carondelet survey, that our opinion is that the executive officers of the government can, after a lapse of twenty-two years, take up a survey for revisal. Twenty years' possession of land, under a claim of right, gives title here; and although no statute of limitations runs against the United States, and no definite period appears to be fixed by law within which the acts of subordinate officers may be revised, we are not prepared to say that twenty-two years would be a reasonable delay.

We have refrained from any discussion of the title of Carondelet as it existed under the Spanish government, or as it was brought to the attention of the board of commis-



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sioners previous to 1812. For my own part I have never been able to perceive any greater difficulties or less merit in the claim of Carondelet than in those of St. Charles and St. Louis. The great obstacle to its early recognition as a valid title seems to have been created by the blunder of the persons who first presented the claim to the old board of commissioners in estimating its area at six thousand arpens. This mistake is not difficult to account for, if we adopt the suggestion made at the bar in the argument of this cause, that the depth of the common field lots was supposed to be the measure of the northern line. These lots being forty arpens in depth, and the starting point for the western line being fixed at their extremity, and the length of that line being one hundred and fifty arpens, the area produced by the northern and western lines, meeting at right angles, would be exactly the quantity claimed. But the common field lots did not extend to the river; and just below them the river deflected considerably to the east, and the line of one hundred and fifty arpens, as fixed by Souldard, instead of being made parallel to the river, was made to conform to the lines of Alvarez and Reihl, so that the metes and bounds included greatly more than the quantity claimed. But these questions can not be regarded now of any practical importance. The act of Congress of June 13, 1812, undoubtedly confirmed the commons of Carondelet; the government has pointed out by a survey the locality of the confirmation, and Carondelet has received the survey. This was done at least as early as 1834, and a claimant under the act of 1836 can not dispute this survey.

Judge Richardson concurring, the judgment of the circuit court is affirmed.

SCOTT, Judge, dissenting. Although the plaintiff Dent stands on the record in the attitude of one seeking to eject the defendants from their possession, yet, from this record and others agreed to be made part of it, it appears that he was the prior occupant of the land in controversy, it being a

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part of a larger tract confirmed to him by the act of Congress of the 4th July, 1836. His controversy is in reality with the city of Carondelet, as the defendants claim through her. The possession of the plaintiff was long prior to any lease of the land in suit by the city of Carondelet, by whom it was claimed as a part of her commons confirmed by the act of Congress of June 13, 1812. The defendants obtained possession with a full knowledge of the rights of the plaintiff. These facts are stated, not with a view to affect the law of the case, with which they have nothing to do, but to meet any complaint of hardship which may be made against disturbing long continued possession. The record shows that if such complaints are to be indulged in, they would come more properly from the plaintiff than the defendants.

This is the third or fourth time that the claim of the plaintiff has been before this court, and there never has been an adjudication hostile to it. He claims under a confirmation by the act of July 4, 1836, and an approved survey thereon. Carondelet and those claiming under her maintain that the land was confirmed to her as a part of her commons by the act of June 13, 1812. The ground on which the right of the plaintiff has been maintained is, that having a confirmation by the act of Congress with an approved survey, his title is a better one than that of Carondelet resting on a confirmation alone, though a prior one, without an approved survey; indeed on one which has been disapproved. This court has held that under the act of June 13, 1812, there may be a recovery on a title by confirmation without a survey, as that act conferred a legal title. (*Funkhouser v. Langkoff*, 26 Mo. 453.) This opinion is fully sustained by the case of *West v. Cochran*, 17 How. 476. Indeed that case is the foundation of the opinion. But, notwithstanding this, there is a class of cases in which the Supreme Court of the United States has held that when a confirmation is vague and indefinite as to its boundaries, a person obtaining a complete title from the general government after the confirmation but before there is an approved survey will hold it against the

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confirmer. Such are the cases of *Menard's heirs v. Massey*, 8 How. 293, and *Cousin v. Blanc's Exec'r*, 19 How. 202.

But this case, as presented to us, does not raise the question whether Carondelet, on her confirmation alone without an approved survey, could have made a defence against the title of the plaintiff, as the only instruction given was that, "if the land in controversy is within the survey of the common of Carondelet made by Rector in 1817 and that made by Brown in 1834, the plaintiff is not entitled to recover in this action." Nor did any of the instructions asked by the defendants put the question to the jury whether the claim of the plaintiff was a part of the commons of Carondelet. The case was made to turn on the survey, and not on the fact whether the claim of the plaintiff was a part of the commons. If the third instruction asked by them was intended for this purpose, it was clearly erroneous; as may be seen by comparing it with the instruction given in the case of *Mackay v. Dillon*, 4 How. 448, for which instruction the judgment was reversed. It took from the jury the question whether the lands were commons or not, and assumed that land might be confirmed by the act of June 13, 1812, whether or not it was commons. That act confirmed to the inhabitants of the villages therein named only commons; and whether land was used as commons prior to the 20th of December, 1803, was a question for the jury. The evidence in the case shows that there was a prior valid title within the boundary claimed for the commons. It also shows that there were concessions within the boundary prior to the date of the paper asserted by Carondelet to be the grant of the commons.

But it is understood that the majority of the court, without controverting the validity of the claim of the plaintiff as it has heretofore stood, maintains that the survey or surveys of Rector and Brown were approved by the opinion of the Secretary of the Interior of February 26, 1855, without inquiring into the regularity of this evidence of title made after the action was begun. An examination will be made to ascertain whether the letter of the secretary can possibly be

construed into such an approval as will affect the rights of the plaintiff in this action. The opinion of the secretary was enclosed in a letter written by the commissioner of the General Land Office and addressed to the surveyor general of Missouri. This letter has been published, and its exposition of the opinion never contradicted. If this letter of the commissioner is to have any weight, prepared under the circumstances it was, with the full knowledge of the secretary if not by his directions as we may suppose, it is not conceivable how a doubt can arise as to the meaning of the secretary's opinion. It leaves no room for even a cavil. The concluding words of that letter are: "You will also declare, in your approval of the Carondelet commons survey, that, as regards the rights of all other claimants within the limits of that survey who hold adversely to Carondelet, your approval is in no manner intended, nor shall it be construed, to interfere with the rights of adverse claimants to seek a judicial settlement of their several interests." But does the opinion of the secretary stand in need of any explanation? He says: "My decision therefore is that the survey of 1816 or 1817, as retraced by Joseph C. Brown in 1834, should be sustained, excluding, of course, the 1702 acres heretofore set apart and reserved for the use of the military post at Jefferson Barracks; and that the parties claiming adversely to Carondelet should not be hindered thereby from establishing and settling their rights before the judicial tribunals of the country." Can language be plainer than this? But if any doubt can arise as to the meaning of this sentence, to be satisfied that it was deliberate and intended its obvious purport, we have only to look to the extract from the opinion of the Supreme Court of the United States cited by the secretary from *MacKay v. Dillon*, 4 How. 446. It is in these words: "The act of Congress of 1812 confirming the claims to commons adjoining and belonging to the town of St. Louis did not define the extent and boundaries of these claims, nor adopt the evidence laid before the commissioners for that purpose. The boundaries of the claim thus confirmed were designedly

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left open to the settlement of the respective claimants by litigation in the courts of justice or otherwise." The letter of the commissioner, by its terms, shows that he is the organ of the secretary, through which he gives directions for carrying out his opinion. That officer directs the surveyor general of Missouri to make the approval of the survey and the terms in which it shall be done, being those above stated. The approval was accordingly made by the surveyor general, with a reservation of the right to private claimants to resort to the courts of justice to adjust their respective claims, as will be seen by reference to his approval endorsed on the plat of the survey of the commons preserved in the bill of exceptions. So that the only approval of the survey that has been made is one in which it has been expressly declared that it is in no manner intended, nor shall it be construed, to interfere with the right of such private claimants as hold adversely to Carondelet "to seek a judicial settlement of their several interests."

Indeed it seems too plain to admit of any doubt that the secretary's approval of the survey was not intended to affect in anywise the right of the plaintiff to his confirmation within the limits of that survey. The only question that can arise on the opinion of the secretary is, whether it is competent to him to give a qualified approval; whether his approval, restricted as it was in its operation, could be sustained; and whether, although restricted in its terms, it would not operate as though it was absolute. But no ground is perceived on which a question can arise as to the exercise of this power by the Secretary of the Interior. The extract from the opinion of the Supreme Court in the case of Mackay v. Dillon, above cited, furnished ample authority for the course pursued by that officer. The control retained by the government over the public surveys is for the preservation of its rights. If the government is satisfied so far as its rights are concerned, why should it go farther, and endeavor to conclude by the acts of its officers individuals from the assertion of their claims. So far as the government was concerned, it



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was satisfied with the survey of the commons, reserving the Barracks and the adjoining land—declaring at the same time that, if there were any rights belonging to individuals hostile to those of Carondelet, it did not intend thereby to interfere with them.

In the case of *Menard v. Massey*, 8 Howard, 314, the Supreme Court of the United States, speaking of the conclusiveness of a survey not appealed from as to the United States, says: "But private claimants of lands within its boundaries, who were no parties to the survey, are not estopped, and may controvert its conclusiveness so far as their claims interfere with the lands thus selected by the party and which were laid off to him by the United States." According to the decision of the Supreme Court of the United States in the case of *Le Bois v. Brammel*, 4 How. 449, an unqualified approval of a survey would have been equivalent to a patent; and being such, the rights of those claiming under a confirmation by the act of the 4th of July, 1836, would have been concluded, as it has always been held that a confirmation under the act of 1812, with a valid survey, is a better title than a confirmation under the act of 1836 with a like survey. As the approval of the survey is an act of the understanding, and as it is evident that the act of the officer, in approving the survey of the commons so far as the United States were concerned, did not intend to affect the hostile rights of claimants of the commons, on what principle can it be maintained to have that effect, but that there could not be any other approval than an absolute one? But as the survey of the commons never has been approved so far as adverse claimants are concerned, how can an imperfect and incomplete approval be construed into a valid one? All that can be said is that an approval affecting the plaintiff has never yet been made, and it is still to be done. The survey as to the plaintiff stands yet unsupported by an approval; but if the government, through her officers, can not make any other than an unqualified approval, on what ground was the approval made reserving 1702 acres on which the Barracks



stand? This ground had not been reserved when the act of 1812 was passed. The Barracks were not commenced until a great many years afterwards, and in this respect the United States were in no better a situation than private claimants; for, if the title by the act of 1812 passed to Carondelet, the government could not afterwards appropriate the land. (*Sigerson v. Hornsby & Dent*, 23 Mo. 268.) Surely the case of *Michell v. United States*, 15 Pet. 52, to which reference was made by the Secretary of the Interior, can not be applicable here, as the Barracks were begun after 1820, long after the Spanish laws had ceased to have any effect in Missouri. The government of the United States, in conveying lands by patent, limits their effect so as to make them operate as quit-claims as to it, leaving the rights of others to the lands patented to be settled and adjusted by the courts. An instance of such a patent, which was approved by the Supreme Court of the United States, is to be found in the case of *Bryan et al. v. Forsyth*, 19 How. 336.

It was maintained in argument before the defendants that, although the survey was not approved by the secretary so as to operate adversely to the rights of the plaintiff, yet the surveys of Rector and Brown stand as approved surveys under the laws of the United States irrespective of the action of the Secretary of the Interior; and being so, they show a right in the defendants superior to that of the plaintiff. If this proposition is correct, the consequence drawn from it can not be controverted. There is some confusion in the argument as to the surveys of Rector and Brown. Sometimes they are regarded as one and the same; sometimes as different surveys, or at least that the survey of Rector by itself without any aid from that of Brown is valid. The object to be attained by thus presenting the survey is to show, that, as the survey of Rector was made as early as 1816, it could not be set aside after so long a period as that intervening between the time of its being made and the time of setting it aside, a space of more than twenty-five years.

The survey of Rector as it stands unconnected with that

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of Brown will be first considered. The act organizing the surveyor general's office for Missouri was passed April 29, 1816. It is admitted that, in order to be valid, the survey must have been by virtue of this law. Now that survey was made in 1816, as appears by the testimony of Milburn, a witness for the defendants, but whether before or after the 29th of April of that year nobody knows. It was agreed that the record of the suit of Bingham v. Dent, a report of which is to be found in 8 Mo. 569, might be read in this case. That case, as is apparent from the report, was prepared by the counsel on the part of Carondelet, who was represented by Bingham, with great care, and there is a long array of papers and documents in support of the claim of Carondelet; yet, as the cause is reported, there is no allusion to the survey of Rector. Brown's survey at the time of the trial had been set aside, and surely, if ever, then there was need of the survey of Rector. If the survey at that time had been regarded as valid, it is difficult to conceive why it was not then produced. It can not be maintained that it was unknown. The clerk, who had seen the field notes of the survey the year after it was made, was then the surveyor general, or, if not, he was still in the office. The fact that the existence of the paper was not known, or that it was forgotten, is a strong argument against it. The survey would not close; it could not be platted. It could not then be lawfully received; and we must presume a violation of duty in a public officer to come to the conclusion that it was approved. No doubt errors were discovered after a survey had been approved. But take the testimony of Milburn, who was in the office from 1818 till 1841, and was part of that time surveyor general, a witness for the defendant, and that of A. H. Evans, a clerk in the office from 1822 till 1836, a witness for the plaintiff, and we must come to the conclusion that there was no regard paid to the survey of Rector until Brown was ordered, in February, 1834, to connect it with the adjoining lands. The testimony of Milburn, who seemed from the documents in the cause to have felt a

decided interest for Carondelet, is conflicting. He says, the field notes of Rector, though in the office, were never acted upon until the date of the surveyor general's order to Brown in 1834; it lay in the office unnoticed until 1834, when it was jointly approved with Brown's survey; that the paper in evidence as Rector's survey is not a recorded survey and forms a part of his official reports on the subject of the Carondelet commons; that surveys were not paid for till examined; thinks this survey was paid for, and that he made out the account; that the lines of the survey would not close, there being a considerable discrepancy; if it was as great as stated he would not approve the survey. Spalding, a clerk in the office, testified that the discrepancy was as great as it had been represented to Milburn. Milburn further stated that a survey was never approved until it was examined, and that he thought Rector's survey was never examined until Brown's survey was made in 1834. A clerk in the office testified that Rector and Brown's survey bore the same number. This being the evidence in support of the survey, can the evidence of Evans, the witness above named, fail to show in what light Rector's survey is to be regarded? He was engaged in the office in platting and examining work. He saw Rector's notes and never regarded them as official, nor ever used them; it was a private matter of Rector; and was told by him, or the surveyor general, that the survey was made for Rector's private use to enable him to locate New Madrid certificates; that his situation in the office enabled him to know what papers were official; that he was familiar with the contracts, orders and instructions to surveyors, and never saw any contract concerning, or order to make, this survey; that his duty was to number and file field notes, but, as he thought, he never filed or numbered those of Rector.

The testimony of the other clerks as to the manner of doing business in the office in later times, and of the great looseness in the practice of the office during the time of which we are speaking, can not materially affect the other evidence

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in relation to the authenticity of Rector's survey. It does seem that the declaration of Milburn that the notes of Rector's survey were not noticed until 1834 ought to be conclusive on this subject.

It is conceived that enough has been said to show that Rector's survey by itself can not be sustained as a legal and official act. It is a matter of no concern what weight is given to it in connection with Brown's survey. It must be considered as only coeval with that of Brown, and stand upon the same footing as regards the supervisory powers of the officers of the general government over the public surveys.

Our order next leads us to the consideration of Brown's survey. That survey was made in 1834, and during the same year was approved by the surveyor general. It was not certified to the General Land Office till 1839, and then in pursuance to an order from the Land department. The main question discussed in relation to this survey was, whether, under the circumstances, the survey, having been made before the act of 1836 reorganizing the Land department, it was subject to the revisory powers of the officers of the general government. It seems to be admitted that when a survey is made and approved by the surveyor general, a party affected thereby may appeal to the Land department. But in what time this appeal must be taken, when the injured party has had notice of the survey; how long he must be allowed to appeal when he has had no notice; or whether he is in the usual exceptions of the statute of limitations; whether the officers of the government can at any, or within what, time interfere with a survey from which there has been no appeal; whether the failure of the surveyor general to send on a copy of the survey to the Land department affects this right, are questions of great importance, and merit the most serious consideration. As the regulations on this subject must be uniform throughout the states in which the public lands lie, this court can not prescribe them; they must be ascertained and fixed by that tribunal to which belongs the interpretation of the laws of the United States in the last resort. The re-

cord before us is a sad commentary on the law in relation to the supervision of surveys by the officers of the general government. To see, during a period of fifteen years, one doing and another undoing, one approving, another disapproving, not in subordination to each other by appeal, but each acting independently of the other, as standing in the relation of predecessor and successor, taking up the subject anew without regard to what had been previously done, and these officers being continually changed, affords a gloomy prospect for the stability of titles to real estate. The views expressed in the case of *Carondelet v. Dent*, 18 Mo. 290, in relation to this subject are still entertained.

But notwithstanding the supervisory power of the officers of the federal government is liable to abuse, our experience and observation teach us that the existence of such a power is necessary. It would lead to too great injustice and oppression if the acts of the surveyor general were final and conclusive. The existence of such a power serves as a check on that officer; and a knowledge that his conduct can be reviewed and his errors corrected serves as a moral restraint, and frequently prevents the necessity for its exercise. It would be observed that Brown's survey was made and approved in 1834. The act of May 26, 1824, was therefore in force, which required that the vacant lots mentioned in the act of 1812, under the instructions of the commissioner of the General Land Office, should be surveyed, designated and set apart for the support of schools in the towns and villages. No reason is seen why the survey of the commons, mentioned in the same section and in connection with the vacant lots, should not be surveyed also under the like instructions. The phrase in that section "under the instructions of the commissioner of the General Land Office" apply as well to the commons as to the vacant lots. If the commons were to be surveyed without directions from the commissioner and to be designated as the private lots, why were they not mentioned in connection with those lots in the first section of the act? Be this as it may, it is impossible to deny that, from the evidence in the record,

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the testimony of the officers in the surveyor general's office, the various instructions from the Land department as published in the Land Laws (2 vol.) of the date of 1838, prepared and printed by order of the Senate, that a supervisory power over surveys has been exercised in some manner from the time of establishing a surveyor general's office in the United States. This power would seem to result from the structure of our federal executive, who is charged with the duty of seeing that the laws are faithfully executed, and who, in the absence of legislative regulations, must see that his subordinates do not trample down all right and justice.

The act of April 29, 1816, providing for the appointment of a surveyor of the public lands in the territories of Illinois and Missouri, made it the duty of that officer to cause to be surveyed the lands in the said territories which have been or may hereafter be confirmed by any act of Congress, which have not been already surveyed according to law, and to forward copies of the plats of the surveys to the commissioner of the General Land Office. The plat of Brown's survey was not forwarded to the Land department until the year 1839, it being made in 1834. The plat was forwarded by an order from the department, and on the 20th January, 1841, the department notified the surveyor general of Missouri that the survey was disapproved. One of the causes of this disapproval was, as this record shows, that the United States Barracks are within the limits of Brown's survey. The government claims, as appurtenant to those Barracks, upwards of 1700 acres of land, all within the survey. The Barracks were erected by appropriations of money made by Congress, and a beginning of them was made prior to Brown's survey. The laws of Congress in relation to this subject disclose this fact. Under these circumstances was there any authority in any officer of the government to approve a survey, the effect of which was to pass the title to lands which had been appropriated by Congress? If the approval by the surveyor general of Brown's survey concluded the plaintiff, it equally concluded the United States, for the title to the commons



dates from the act of June 13, 1812, long before there was any appropriation by Congress for the Barracks. Any secret arrangement at the time, or a subsequent one, between the officers of the government and Carondelet, by which the claims of the United States were secured, thus making the survey harmless to them but binding on the private claimants, was a disgrace to all those concerned in it; and it would be a great outrage to permit an approval obtained by such means to have the least weight or authority against the plaintiff. Whatever may be the law as to the power of the officers over surveys, under the peculiar circumstances of this case, I am not of the opinion that the survey of Brown stood as an approved one when it was first interfered with by the Land department.

If the approval of the survey by the Secretary of the Interior, in February, 1855, was designed only to affect and conclude the rights of the United States, leaving the rights of private claimants undisturbed by it and remaining as though the approval had not been made, then it is obvious that the claim of the plaintiff has not been tried on its merits, as the question whether it was a part of the commons has never been submitted to a jury, which is required in an action on a confirmation by the act of 1812, according to the doctrine of *West v. Cochran*, 17 How. 416. In suits on such titles, the act confirming the title is regarded as a patent, and the party relying on it must produce the evidence which shows that the land sued for is that confirmed by the act of Congress. The history of these commons show that valid private claims might exist within the outboundary of their survey. (*Inhabitants of Carondelet v. Dent*, 18 Mo. 292.) In my opinion, the judgment should be reversed.

## CITY OF CARONDELET, Appellant, v. CITY OF ST. LOUIS, Respondent.

1. Although an approved United States survey of the common confirmed to the inhabitants of a town or village by the act of June 13, 1812, is only *prima facie* evidence of the true location and extent of such common as against such town or village, yet if such survey should be accepted by such town or village, it would be conclusive and binding upon it as to the location and extent of the common confirmed, and it and the inhabitants thereof would be estopped to claim as a part of the commons of said town any land lying outside of said survey.
2. It is for the court to say what facts constitute an acceptance by a town or village of a survey of common, and work an estoppel.
3. The estoppel to be binding must be mutual; if the United States are not bound by the survey, neither is the claimant of common.
4. The existence of valid private claims within the limits of a survey of common would not be inconsistent with an estoppel as between the government and the village or town claiming common.
5. A survey of common, if accepted at all, must be accepted as an entirety; it can not be accepted in part and rejected in part.

*Appeal from St. Louis Land Court.*

This cause has heretofore been before the supreme court. (See Carondelet v. St. Louis, 25 Mo. 448. On the trial an immense mass of evidence was adduced. It is deemed unnecessary to set it forth. The court, at the instance of the plaintiff, gave the following instructions: "1. All the right, title and interest of the United States in and to the commons of Carondelet was vested in the inhabitants of Carondelet on the 13th of June, 1812, according to the extent and boundaries of the said commons as the same existed and had been claimed and used by the said inhabitants in common prior to and until the 20th day of Dember, 1803." "22. If the jury find for the plaintiff, and further find that the defendant had knowledge of the plaintiff's claim five years before the commencement of this suit, then the plaintiff is entitled to recover as damages for rents and profits the value of such rents and profits for five years before the commencement of this suit and from the commencement of this suit up to this date ;

and the jury shall further find the value of the monthly rents and profits of the premises in question." "24. If the jury find from the evidence that before, at the time of, and after, the survey of Brown of the commons of Carondelet of 1834, the board of trustees of Carondelet claimed the commons of Carondelet on the north of the village to extend to the Sugar Loaf; and that said corporate authorities of Carondelet did not accept the said survey of 1834 as the true limit of the commons of Carondelet on the north, but continued from the time of said survey of 1834 to claim as their commons the premises in controversy as a part of their commons until the commencement of this suit, then the plaintiff is not estopped by said survey of 1834 from recovering the premises sued for in this action, if the said premises lie within the commons of Carondelet as used by the inhabitants of the village before the 20th day of December, 1803."

The court, at the instance of the defendant, gave the following instructions: "1. If the jury believe from the evidence that the survey, made in 1834 by Joseph C. Brown, of the common of Carondelet, was within the same year returned to the office of the surveyor general of public lands of Illinois and Missouri, and was in that year approved by such surveyor general, and that that survey is now the approved survey of said common as recognized by the Land department of the United States; and if the jury further find that the board of trustees of said town of Carondelet were notified by said Brown, before said survey was made, that he had received his instructions, and would commence the work at a time named; that said board of trustees appointed a committee to superintend the survey; that afterwards said committee reported to said board of trustees that Joseph C. Brown had completed the survey of the common, and that the duties assigned them were duly performed; that said trustees ordered the persons employed in said survey to be paid, and appointed Joseph Chattillon to set up a stone every half mile on the line of said commons where necessary in order to designate the line properly; and if the jury further

find that afterwards and within the year 1834 the board of trustees of said town of Carondelet obtained a plat of said survey of the commons and a confirmation certificate issued by the recorder of land titles and based upon said survey, and ordered said survey and confirmation certificate to be filed in their office, and directed the register to have the survey framed for the use of the town; and if the jury further find that afterwards in the year 1839 and subsequently thereto the board of trustees of said town of Carondelet caused the land included within said survey to be subdivided into lots or tracts, conforming in such subdivisions to the exterior lines of said survey as the boundary of the commons, and did proceed to dispose of said lands according to such subdivisions by leases for ninety-nine years, renewable; and if the jury further find that the corporation of said town of Carondelet, in different suits at law in which the title to the commons of said town came in question, did exhibit and give in evidence the said survey as the regular and approved survey of the commons of said town; and if the jury further find that the said corporation of Carondelet, for fifteen years after the said survey was approved and recorded, made no application to the Land department of the United States to have said survey set aside or changed—then these facts are in law an acceptance of such survey by the corporation of Carondelet; and such acceptance estops the plaintiffs from claiming as a part of the commons of said town any land lying outside of said survey. 10. But if the jury believe, from the evidence, the facts set forth in instruction numbered one given for defendant to the jury, then no claim of commons by the corporate authorities of Carondelet outside of the survey by Brown of 1834 should be regarded by the jury, unless made and insisted on in the Land department of the United States, and as a claim upon or against the United States for commons outside of said survey.”

Many instructions asked by the plaintiff were refused by the court. It is deemed unnecessary to set them forth. The jury found for the defendant.

*A. Leonard and B. A. Hill*, for appellant.

I. Carondelet has shown by acts of possession a legal title to the land in controversy under the act of Congress of June 13, 1812, as being part of their commons, and this title must prevail unless it has divested itself of it by some act of its own competent to produce that effect, or unless a paramount adverse title has been shown. The inhabitants were in Spanish times in possession of part of the royal domain as commons of their village. It may be admitted that the possession of commons by the French and Spanish towns was a mere precarious possession at the will of the king. (3 Mart. 307, 673; 6 Mo. 511.) The act of 1812 turned, *proprio vigore*, this actual possession into an ownership. A mere condition of fact became by that act a condition of right. (6 Mo. 511; 2 How. 345; 4 How. 421; 16 How. 494; 17 How. 416; 2 Mo. 192; 25 Mo. 448; 23 Mo. 532.) It is not necessary that there should have been a formal grant of commons, or a designation by survey of a specific piece of ground to be used as commons, or that the land should fall within the outboundary line as run.

II. Carondelet has not divested herself of her original title. The doctrine of Menard's heirs v. Massey, 8 How. 314, in reference to the acceptance of a survey, is not applicable to the present survey; and if it be, the question of acceptance, according to Carondelet v. McPherson, 20 Mo. 203, in which case this doctrine of acceptance was first applied to such a survey as the present, is a question of fact, and not a question of law to be determined by the court, as was done in the present case by the court below. In Menard v. Massey the grant was of a quantity of land at a designated locality, and no title passed until the survey was made. When the survey was made the claimant took the land embraced in it, or he took nothing. The reason of the rule is not applicable to such a survey as the present. Assuming, however, that this doctrine in Carondelet v. McPherson is to stand as the law, it is part of that doctrine that the question of accept-

ance is one of fact and not of law. Here the question of acceptance was not only withdrawn from the jury, and the law ruled to be, that if the particular facts recited in the defendant's first instruction were true they constituted an acceptance of the survey as a matter of law regardless of all the other qualifying acts of the party in relation to the same matter; but the court went even beyond this, and declared in substance that if the recited facts were true the plaintiff was estopped from recovering any land outside of the survey, although Carondelet had always refused to accept the survey as fixing the true limits of the commons on the north, and had always continued to claim the land now sued for as a part of the commons, provided this claim had not been made and prosecuted before the Land department of the United States. (See 12 Wend. 130; 16 Wend. 285; 7 Ind. 460; 6 Fost. 482.) The common law doctrine of estoppel can not be invoked in the present case. That doctrine is only applicable where there has been an admission by word or deed, upon which another has acted, and which can not be retracted without damage to the party that has acted upon the faith of it; and even then it is an estoppel only in favor of the party who has acted upon the admission and not in favor of others. This doctrine is not applicable to this case. (3 Hill, 219; 14 Mo. 487; 40 Maine, 354.)

III. The corporate authorities at the time they did the acts imputed to them in the defendant's instruction had no power to dispose of this property by an express transaction to that effect; and of course could not do this indirectly by the voluntary acceptance of a survey or by acquiescence in a division line. Until the act of March 1, 1851, the corporation did not possess the power of disposing of the property, or of changing the destination, either under the Spanish or common law or the statute law of this state. (1 Mackeldey, Comp. of Mod. Civ. Law, 158, § 157; 1 Pothier's Pandects, 45, tit. 8, art. 2; Thibaut's System of Rights, p. 95, § 115, 3 Partidas, Law 9, tit. 28.) The land was vested in the inhabitants as a society, to be used by them individually in



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common for all the purposes to which they had previously applied it. By the Spanish as well as by the civil law things of this character (*res universitatis* and *res publicæ*, in the strict sense of the terms) are out of commerce and inalienable. The individual members of the community are entitled of right to use them for the purposes to which they are designed, or, in the language of our law, dedicated either by their own nature or by the provision of the former owner; and the community as an organized society have the administration of the property—that is, the power of regulating the use of it; but they can not dispose of it, or even change its destination, except with the consent of the sovereign, who represents in this matter the future generations of members, and with whose consent therefore the community may exercise the whole dominion over it, disposing of it as they think proper. (5 Partidas, law 5, tit. 5; 3 Louis. 239; Parish v. Municipality, 8 Louis. 149; 2 Domat, Pub. Law, lib. 1, tit. 8, secs. 2, 3, 16; New Orleans v. United States, 10 Pet. 723; Mayor of New Orleans v. Hopkins, 13 Louis. 330; De Armas v. Mayor of New Orleans 5 Louis. 145.) Things dedicated to the public use of the state, or to the public use of any local community, whether organized as a judicial community or not, seem by the common law, as it is now understood and administered in the United States, to be objects of the same character of ownership as the *res universitatis* and the *res publicæ* of the civil law. The necessity for such a modification of property has, it would seem, forced this kind of ownership into our legal system; and the rules that regulate it result from the nature of the property. The community in their corporate capacity have necessarily the power of regulating the enjoyment of it among their members, and the members themselves are entitled in that character to the use of it. The society, however, can not alien it, or change its destination, even with the consent of all their members; but this may be done with the consent of the sovereign, who acts in this matter from the necessity of the case, as the guardian of the future generations of members. (Cincinnati v.

White's Lessee, 6 Pet. 432; Barclay v. Howell's Lessee, 6 Peters, 500; New Orleans v. United States, 10 Peters, 712; Alors v. Town of Henderson, 16 B. Monr. 168; Langley v. Gallipolis, 2 Ohio, State, 111; The Commonwealth v. Alburger, 1 Whart. 469; Hunter v. Trustees of Sandy Hill, 6 Hill, 410; Warren v. Town of Jacksonville, 15 Ill. 236.) These commons could not be disposed of except by the express authority of the legislature. Acts of the corporate authorities of Carondelet done before they had authority to dispose of the property are incompetent in point of law to effect an alienation of it. The survey may be presumed to be correct as against the commons title; but when this presumption is met and repelled by proof showing that the survey cuts off a large proportion of the land, it can not be made effectual for this purpose by proof of acceptance or acquiescence on the part of the corporate authorities, unless they were expressly authorized by the legislature to compromise the rights of the community by such act. (New Orleans v. United States, 10 Pet. 736; Dugal v. Fryer, 3 Mo. 31; Porter v. Rummery, 10 Mass. 72.) The defendant's instructions assumed that if Brown's survey was approved by the surveyor general in 1834, it was the subsisting approved survey at the time of the trial. The head of the executive department had the right to revise the action of the inferior executive office. The survey made in 1855 is not Brown's survey of 1834; it would seem little less than absurd to call them identical in reference to the question of acceptance.

*A. Todd, Bay*, (city counsellor) and *McPherson*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The question upon which this case turned in the Land Court we consider as virtually settled by the previous decisions of this court, and fully supported by distinct enunciations of the same principle, and a similar application of it by the Supreme Court of the United States.

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In the case of Carondelet v. McPherson, this court declared "that a survey regularly made and approved is conclusive upon the government that the land within the boundaries is the land granted, and the acceptance of the survey by the grantee is conclusive that *all* the land granted is within the boundaries." (20 Mo. 204.)

In the case now under consideration this court said: "If the survey of 1834 was approved it would be *prima facie* evidence of the true location and boundaries of the Carondelet common, and the plaintiff could not recover without showing that it was incorrect *and had never been recognized or accepted*. No formal act is necessary to constitute an acceptance, but it may be inferred from a variety of acts and circumstances; and though the acts of the party going to show that the survey had been accepted must be proven as facts to the jury, it will be the province of the court to declare, as a matter of law, the legal effect of particular acts bearing on the question. (Carondelet v. St. Louis, 25 Mo. 464.)

In Menard v. Massey, 8 Howard, 314, it is declared that "when the survey is made and the field notes returned to the surveyor general's office, and the description and plat made out in form and approved by the surveyor general, it is conclusive evidence, as against the United States, that the land granted by the confirmation is the same described and bounded by the survey, unless an appeal is taken by either party or an opposing claimant to the commissioner of the General Land Office. This consideration depends on the fact that the claimant and the United States were parties to the selection of the land, for, as they agreed to the survey, they are mutually bound and respectively estopped by it."

In Guitard v. Stoddard, 16 Howard, 512, Mr. Justice Campbell, in speaking of the importance of a survey, and in reference to a confirmation of a common field lot under the act of 1812, reiterates with approbation this language of Mr. Justice Catron in Menard v. Massey.

The position of this court in the case of the City of Carondelet v. The City of St. Louis, 25 Mo. 449, in relation to the

mode of establishing on the trial the fact of acceptance of a survey is not understood to conflict with the views expressed in the case of Carondelet v. McPherson. In the last named case, the facts upon which the question of acceptance depended had not been passed upon by the jury, either with or without instructions from the court which tried the case; and this court could not, as a matter of law, assume the existence of any number of facts, or any one fact, which, when established by a verdict, might in their estimation constitute an acceptance. Whether there was an acceptance or not was regarded as a fact to be established to the satisfaction of the jury; and so it was considered in the case of The City of Carondelet v. The City of St. Louis; but it was further added in this last case—what we suppose to be entirely consistent with the views expressed in the former one—that an explanation of the facts which legally constitute a binding acceptance is properly within the province of the court; and such was the view of a question analagous to this in the case of Minor v. Edwards & Price, 12 Mo. 137.

However this may be, we are clearly of opinion that it is for the court to say what acts will in law constitute an estoppel; and, aside from any mere verbal criticism upon the instructions of the Land Court and the order in which they are now found upon the record, they submit to the jury, substantially and *seriatim*, all the facts enumerated by the court in Carondelet v. McPherson, and almost in the language of that opinion, and declare that these facts, if they existed, constituted an acceptance of the survey.

Assuming, however, that these decisions are not binding upon us, or that they will admit of a different interpretation, and considering the question as an open one, our opinion in relation to the merits of this case is not changed. We are unable to perceive any thing startling or novel, much less the slightest appearance of injustice or harshness, in the application of this familiar doctrine of the common law concerning estoppel to the public surveys. On the contrary, its mere enunciation must commend itself to the sense of justice

and propriety entertained by all persons independent of legal enactments or judicial decisions.

A claimant of a specific tract of land, for the title to which he depends entirely upon the government, applies to that government for a confirmation. His application is heard and granted, and, at his instance, the government, through its authorized agent, points out by a survey the exact tract which has been thus confirmed or granted. The claimant accepts the land thus designated, takes possession and disposes of it. Shall he be allowed after this to turn round and say his land, thus granted and surveyed, accepted and disposed of, was not at the place where the government had located it, but at another and different place? Is there any principle of justice or natural reason which would tolerate such a course? On the contrary, is it not in conformity to common sense, as well as common right, that the party—who has thus declared, by the most deliberate and solemn action of which the subject matter admitted, that his confirmation was at the place where the government had located it—should not be allowed afterwards to deny it, however false may have been the original assertion? The common law doctrine of estoppel is not a technical one, nor is it an inflexible iron rule confining itself to a given state of facts, but a principle of justice and public policy, adapting itself to varying circumstances. It is merely an admission, made in a form so deliberate and so solemn, either by record, by deed, or by act, as that public policy will not permit it to be contradicted. We see no impropriety in applying it to the peculiar condition of things, which has sprung up here in reference to Spanish grants and United States confirmations and surveys. That it is just and equitable no one will deny; that it is in conformity to the spirit of the laws of the United States upon this subject, interpreted as they have been by the highest tribunal authorized to pass upon these laws, is manifested by what has already fallen from that court, and it is only upon the most technical grounds that the doctrine is objected to.

That the estoppel must be mutual in order to be binding

is plain. If the government is not bound, neither is the claimant. But the view entertained of Brown's survey of 1834, in the case of *Sigerson v. Dent*, is that the government was bound by it; and if the government was bound by it, Carondelet was equally bound by it if she accepted the land so surveyed as her common.

If the exclusion of the 1702 acres of land from Brown's survey for a military reservation had been made without the consent of Carondelet, and was a valid exclusion within the power of the government at the time it was done, we should of course concur in the views urged by the counsel for Carondelet in this case. In that event, the government of the United States not being bound by the survey, neither were the inhabitants of Carondelet, however much they may have insisted upon its validity, and whatever action they may have taken in reference to it. But we have in the record two ordinances of the city of Carondelet, and a deed of conveyance, giving undoubted proof of the consent of Carondelet to this reservation.

The existence of valid claims within the limits of the survey of Brown would of course form no objection to the estoppel either on one side or the other. The survey was not binding on third persons. Neither the government nor Carondelet could affect the title of adverse claimants by any agreement of theirs to a survey.

It has been urged in this case that, as the corporate authorities of Carondelet had not any power in 1834, or previous to 1851, to sell this land in fee simple, they could not, therefore, at the date of this survey, by any consent or acts of formal acceptance, part with their title to any portion of their common, outside of Brown's survey, confirmed by the act of 1812, upon *user* alone.

The titles, which have sprung up here, based upon inchoate claims originating under another government, and especially those concerning the commons attached by law and usages to certain ancient villages, have occasioned much legislation on the part of the federal government and on the part of the



state, and many decisions upon those laws by the courts of both, which, in truth, constitute mainly the law by which these titles are to be construed and governed. The common law and the law of Spain, and the civil law which was its basis, may guide or illustrate, but can not control. After all, we must follow that interpretation of the statutes relating to this subject which a long series of authoritative judicial decisions may require. The whole system is *sui generis*; and the security and stability of titles require that it should be so maintained; and general principles, abstractly correct, ought not and can not safely be taken, either from the Spanish or common law, to affect the stability of titles deriving their efficacy from the laws of the United States and of this state and judicial interpretation of those laws, and which have been passed from hand to hand upon the faith of these decisions and laws.

We do not mean by these remarks to admit that the conclusion arrived at in this case is inconsistent with any principle of either the common law, or the law of Spain under which this property in commons originated. All we mean to say is, that the titles growing out of this peculiar property, now based upon laws of the United States and of this state, and upon judicial interpretations of those laws, must be governed mainly by reference to these laws and decisions.

The question on the trial of this case was not, whether in 1834, the date of Brown's survey, Carondelet had any power to dispose of her commons in fee simple, but whether, either then, or at any time anterior to the trial, her acts in relation to this property amounted to an acceptance of the survey and an appropriation of the land within its limits as her common. Conceding that the corporate authorities of Carondelet possessed no power of making a fee simple title to these lands in 1834, and that her leases in 1838, for ninety-nine years, renewable at the pleasure of the lessee, are distinguishable from an absolute disposition of the common—although the difference for all practical purposes may be quite inappreciable—yet in 1851 her charter gave her an absolute con-

trol over this property and a power to convert these leases into fee simple titles. In 1834 the power to lease was given, and in 1839 the leases previously made were sanctioned by an express enactment of the legislature of Missouri. (Sess. Acts, p. 148.) Whether Carondelet possessed the power, therefore, in 1834 to part with any of her title to her common or not, she certainly had that power long before this suit was brought, and had, by her application to the legislature in 1838, and her application to Congress in 1848, expressly sanctioned her previous disposition of these lands in 1838. So that at the time of the trial, when her power could not be questioned, she occupied the same position in relation to her assent and ratification of Brown's survey as she had done previously when her power to give such an assent might have been questioned.

The history of this controversy, as exhibited on this record, shows that the authorities of Carondelet always acquiesced in the survey of their commons so long as the government of the United States showed a disposition to respect it. Previous to the survey, it is true, some of the authorities of Carondelet, and probably some of the inhabitants who had no authority, remonstrated most earnestly, and perhaps justly, against Brown's survey of the St. Louis common, which, as they alleged, encroached upon their common on the north. But when Brown's survey of their common was made, embracing as it did several thousand acres more than their original claim in quantity called for, no further complaint was made, at least to the government, and it was not until the officers of the government commenced efforts to overturn this survey that Carondelet sent up her remonstrances to Washington. The controversy was then kept up; but as the government finally acquiesced in the survey, and the original approval of the surveyor general was allowed to stand, the same rule should apply to Carondelet, and both parties be held equally bound.

It is hardly necessary to add—what has already been distinctly declared by this court in the case of Carondelet v.

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McPherson—that a survey of a confirmation is a survey of the *whole* confirmation, and that it must be received by the claimants as it is offered by the government as an entirety. The survey purports to embrace all the land within the claim; and if accepted at all, it must be taken in the sense in which it is granted. Carondelet can not accept a survey of 9,000 acres as a satisfaction of her claim under the act of 1812 for common, and at the same time be allowed to assert that there remains land outside of the survey within the confirmation. Such is not the purport or intendment of the law; and, as the government never makes, and is indeed not authorized to make, any such partial surveys, so the party that takes them must receive them in the sense in which they are given. Upon any other construction a survey could not be held binding on the government. Judgment affirmed.

SCOTT, Judge, dissenting. I am in favor of reversing this judgment on account of the instruction given by the court below. For my views on this subject see the opinion filed by me in the case of *Dent v. Sigerson*, decided at the present term of the court.



FUNKHOUSER, Respondent, v. HANTZ & SPALDING, Appellants.

1. The title of Carondelet to the land embraced within the United States survey of the commons of Carondelet made by Brown in 1834 is superior to and must prevail over an entry with the register and receiver of a portion thereof in 1847.
2. An entry in 1847 in the office of the register and receiver of land embraced within Brown's survey of the commons of Carondelet was unauthorized by law and would confer no title even as against the United States.

*Appeal from St. Louis Land Court.*

This was an action in the nature of an action of ejectment to recover possession of lots 175 and 177 in Carondelet commons, south of the river Des Peres. The plaintiff claims title under the city of Carondelet; the defendant under and by

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Funkhouser v. Hantz & Spalding.

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virtue of a preëmption certificate, dated November 18, 1847, issued in favor of John G. Merlin, for the south-west quarter of fractional section seven, township forty-three, and which included the land in controversy. Testimony was introduced by defendant with a view to show that, judging by the field notes of Rector's survey, the land in controversy lies outside Rector's survey of Carondelet commons, though within Brown's survey.

The court, after refusing numerous instructions asked by defendant, submitted the cause to the jury upon the following instruction, given at the instance of the plaintiff: "The acts of Congress of June 13, 1812, May 26, 1824, and January 27, 1831, together with the official survey and designation of the common in 1834, read in evidence by the plaintiff, were effectual to pass to the inhabitants of the town of Carondelet all the title of the United States to the land embraced in such survey and designation at the time the same was made; and if the jury believe from the evidence that the land in controversy is embraced within said survey of the commons of Carondelet made in 1834, then they will find for the plaintiff."

The jury found for plaintiff.

*Whittelsey, Hill, and Williams*, for appellant.

I. The survey of Rector was the legally approved survey of the commons of Carondelet made in 1817 by the proper officers of the United States in obedience to the laws as they then stood. (Acts of Congress of June 13, 1812, and April 29, 1816.) This survey having been acquiesced in by Carondelet, is to her an estoppel. (*Menard v. Massey*, 8 How. 301.) The land being outside of Rector's survey and having been ordered for sale by the department of public lands, and an entry having been made while Brown's survey was in controversy, the defendants are entitled to show the facts and to put the plaintiff upon better proof than Brown's survey to show the extent of commons. Rector's survey being now the approved survey, the defendants may show, as mat-

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ter of fact, that they are without Rector's survey, and entitled to retain possession of the land sued for.

*R. M. Field*, for respondent.

I. The instruction given was correct. The long dispute about the correctness of Brown's survey is at an end, and the United States and all claiming under them are estopped from denying that the land embraced in the survey was confirmed to Carondelet in 1812. (*Menard v. Massey*, 8 How. 310; *West v. Cochran*, 17 How. 403.)

NAPTON, Judge, delivered the opinion of the court.

The opinion of the court in the case of *Sigerson v. Dent* disposes of the main question in this case. The entry of *Merlin* in 1847 must yield to the title of *Carondelet* based upon the survey of 1834.

But the entry, it may also be observed, was wholly unauthorized by law, and contrary to the express directions of the Land department. Although the commissioner of the Land Office (*Mr. Whitcomb*) had in a letter to the surveyor general in January, 1841, directed the land here in dispute, and a considerable extent of adjoining land within the limits of *Brown's* survey, to be surveyed as public land and offered for sale, yet in September, 1845, this order was directly countermanded by *Gen. Shields*, the then commissioner. In a letter to surveyor general *Conway* of September 1, 1845, and in a letter to *Alexander Kayser* of the same date, and in a letter to *Mr. Tibbatts*, of the House of Representatives, of February 14, 1846, *Brown's* survey is ordered to stand and not to be interfered with, except some law of Congress should so authorize. The acting commissioner, *Piper*, also, in a letter to *Wm. Schlick*, of June 17, 1846, and the commissioner *Young*, in a letter to *LeBlond*, of August, 1847, and in a letter to the register of the Land Office of August 6, 1846, relative to the application of *Delor*, confirms the previous determination of the Land department on this subject. The entry of *Merlin* in November, 1847, was made

against these positive orders; and in August, 1848, the commissioner Young orders the register to report to him a list of such entries; and they are all suspended, and no patents have ever been issued.

Under these circumstances, the entry can not be considered as conferring any title, even as against the United States. Judgment affirmed.



CHAMBERS *et al.*, Appellants, v. CITY OF ST. LOUIS, Respondent. \*

1. The City of St. Louis, under its charter and the general law concerning corporations, has power to acquire and hold such land beyond the limits of the city as may be necessary for the purposes of the corporation; the right of the city to hold land beyond the city limits is not restricted to the specific purposes mentioned in the second section of the first article of the charter of St. Louis of March 3, 1851.
2. The question whether a municipal corporation, authorized to purchase and hold real estate for certain purposes, transcends the exact limits of its power, and acquires land that it is not authorized to hold for any of the purposes of the corporation, can only be raised and determined in a proceeding instituted at the instance of the state.
3. Municipal corporations may hold property in trust for charitable uses; they may be compelled in equity to administer and execute the trusts imposed upon them.
4. The statute of 43 Elizabeth concerning charitable uses is, it seems, in force in this state.
5. Gifts to charitable uses were valid and binding dispositions previous to the passage of the statute 43 Elizabeth, ch. 4; the law of charities did not derive its existence from said statute. The jurisdiction of courts of equity over charitable uses and devises is not grounded, in this state, upon said statute, but upon the common law.

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\* The opinion of the supreme court in this case is also applicable to a case brought to the supreme court by appeal from the St. Louis circuit court. The case referred to had its origin in the St. Louis probate court. On the occasion of an annual settlement in that court by the executors of Bryan Mullanphy, the court ordered distribution of the balance in the hands of said executors, and directed one-third part thereof to be paid to the City of St. Louis, and two-thirds to be distributed among the heirs. From this order the heirs appealed to the circuit court, which sustained the order. The heirs appealed to the supreme court.



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Chambers v. City of St. Louis.

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6. In the year 1849 one Bryan Mullanphy made his last will in the following words: "I, Bryan Mullanphy, do make and declare the following to be my last will and testament: *One equal undivided third of all my property, real, personal and mixed, I leave to the City of St. Louis, in the state of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the west.* I do appoint Felix Costé and Peter G. Camden executors of this, my last will and testament, and of any other will or executory devise that I may leave. All and any such document will be found to be olograph, all in my own handwriting. In testimony whereof witness my hand and seal. [Signed] Bryan Mullanphy (seal)." The testator died in 1851, leaving a large estate, valued at more than a million and a half of dollars, the greater part of which consisted of lands situate in St. Louis county, beyond the limits of the city. The will was duly admitted to probate. *Held*, that the devise was a good and valid devise; that the City of St. Louis was capacitated to take and hold all the property embraced within the terms of the will upon the trusts therein indicated, and to execute and administer said trusts, subject to the control of a court of equity.

*Appeal from St. Louis Land Court.*

This was a suit for partition of the real estate belonging to the estate of Bryan Mullanphy, deceased. Charles Chambers and Jane Chambers his wife were plaintiffs, and Richard Graham and Catherine Graham his wife and others, the heirs of said Bryan Mullanphy, together with the City of St. Louis, were defendants. The petition set forth the will of said Mullanphy and insisted that the devise therein to the City of St. Louis was void, and that the heirs were entitled to the whole estate. The court decided that the devise to the city was valid, and assigned one-third of the real property to the city and two-thirds to the heirs. The greater portion of the real estate embraced in the will is situate in the county of St. Louis and beyond the limits of the city. The heirs appealed to the supreme court. The will is set forth below in the opinion of the court.

*Field & Shepley*, for appellants. Mr. Shepley, in a printed brief, presented the following points:

I. The City of St. Louis is not competent to take the trust attempted to be created by this will, neither the personalty nor the realty. It can not take the realty for, 1st. The pur-

poses for which the city can take and hold any real estate are enumerated in the first article of the amended charter of 1851. The power to receive and hold property within the city is unrestricted in terms, but beyond the city limits it can only take and hold for certain specific objects only, none of which are included in this trust; so that, 2d. The city can not take that portion beyond the city limits, because it is not claimed for any use mentioned in the charter. 3d. If not expressly conferred by its charter, nor necessary for the exercise of the powers given in it, then by the third section of the act concerning corporations any such power is denied. (R. C. 1845, p. 232.) The clause in the general corporation law applies only to cases where land is necessary for the exercise of corporate powers *as land*, and not to hold as a fund to get an income to defray corporate expenses. It can take neither the personalty nor realty, for, 4th. In order to enable the city to take this trust, it must be within the scope of its powers conferred by its charter. This would seem to be obvious enough, as a municipal corporation, as any other corporation, is but the creation of the legislature, with just as much vitality, with just so long a period of existence, and with just such powers and functions, as its creator chose to confer, and no more. (See *Vidal v. Girard's Exec'rs*, 2 How. 128; in the matter of *Howe*, 1 Paige, Ch. 214; *Jackson v. Hartwell*, 8 John. 422; *Andrew v. The New York Bible & P. B. Society*, 4 Sand. S. C. 185; *Ayres v. Methodist Church*, 3 Sand. S. C. 351; *Ins. Co. v. Ely*, 2 Cow. 678; *Trustees of N. M. Sem. v. Peaslee*, 15 N. H. 317; *Greene v. Dewins*, 6 Conn. 294, 304; 2 Kent's Com. 279, 280; *People v. Utica Ins. Co.* 15 John, 383; *Angel & Ames on Corp.* § 111; *Octavia Boyce et al. v. City of St. Louis et al.*, in the supreme court of New York.) 5th. The subject or the objects of the trust are not within any of the powers conferred on the city by its charter. The delegated powers are specified in the third article of the amended charter. In neither of these are any powers conferred to which this trust can attach. The city is no eleemosynary institution. It was not created to

distribute charities. It has none of the machinery for any such object. The distinction between civil and eleemosynary corporations is important. The case of Dartmouth College v. Woodward, 4 Whea. —, turned upon it. An eleemosynary corporation implies a contract with the founder, and the corporation is above the power of the legislature to repeal or alter.

II. Even if the trustees could take, yet the trust as declared by this will is so vague, uncertain and indefinite as to be void. It will scarcely be asserted that, if this was the case of an ordinary trust, it could be for a moment maintained; but it is attempted to be supported on the ground that it is a charity, and as such, that different principles apply to such a class of trusts from those that affect ordinary trusts; and it is asserted that both by the statute of 43 Elizabeth, and also by the general powers belonging to a court of chancery, a trust like this is legalized and supported. To this we say—

1st. That before the passage of the 43 of Elizabeth it is certain that, when the objects of the charity could not, like any other *cestui que trust*, come into court and claim the interference of the court, the trust could not be supported. The case of a superstitious use was the only exception. By statute 23 Henry 8, c. 10, the uses therein mentioned were declared to be within the statute of mortmain. Of course the king could have the benefit of them. So the statute 1 Ed. 6, ch. 14, enacted that the uses declared to be superstitious should vest in the king. Perhaps these statutes against superstitious uses were the origin of the royal prerogative to dispose of certain charities by sign manual. By this we mean that, if you admit that charitable trusts existed and could be enforced prior to the act of 43 of Elizabeth, yet they were just such trusts, and *none other*, as could be enforced in cases of ordinary trust. They were either cases where the *cestui que trust* was a corporation, or where the recipients of the bounty were so distinctly pointed out that in their own names they could file a bill to have the trust enforced. (Bap-

tist Ass. v. Hart's Exec'rs. 4 Wheat. 1, 387; 3 Peters' Appendix, 481; Ayres v. Trustees of Meth. Ch. 3 Sand. S. C. 367; Wheeler v. Smith et al., 9 How. 55; Gallego v. The Att'y Gen'l, 3 Leigh, 450; D'Osbriel v. Att'y Gen'l, 5 Harris & Johns. 398; Chittenden v. Chittenden et al., 1 vol. Am. Law Reg. 538, 545; Owens v. Missionary Soc., &c. 14 N. Y. 387, 399.)

2d. The statute of 43 Elizabeth is not in force in this state. Our statute provides that the common law of England and all the statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom—which common law and statutes are not repugnant to or inconsistent with the constitution of the United States, the constitution of this state, or the statute laws for the time being—shall be the rule of action and decision in this state. This statute is both local to the kingdom and repugnant to our constitution and laws. That statute is of local policy and connected with local establishments. This is sufficiently evident from the act itself. It arose out of the peculiar circumstances in which England was placed by the suppression of the monasteries, and is part of the same system as the poor laws framed at the same time, and which have never been regarded as being in force in America. (See also Witman v. Lex. 17 Serg. & R. 88, 91; Dashiell v. Att'y Gen'l, 5 Har. & Jo. 401-2; Gallego v. Att'y Gen'l, 3 Leigh, 450; 2 Kent's Com. 282, 287; Gray et al. v. Allen et al., 5 Humph. 206.) The machinery with which it acts is no part of our system. It is legislative not upon ordinary or extraordinary powers belonging to a court of chancery, but upon prerogative rights as appertaining to the king, and exercised by the chancellor as his *personal* representative, and therefore can be no part of the law of this state. Our statute adopting the English common law and statutes was borrowed from the Virginia act of 1776. But in Virginia the statute 43 Elizabeth was never in force, and was never expressly repealed. (See proceedings of Committee of Revision, 1789, in the Journal of the House

of Delegates.) In 4 Kent's Commentaries, p. 509, note, it is said "the jurisdiction vested by *the statute of Elizabeth* over charitable uses is said to be *personally* in the chancellor, and *does not* belong to his ordinary or extraordinary jurisdiction in chancery." (See also Story Eq. Juris. § 1188.) The royal prerogative exists in none of the departments of our government. Not in the general assembly, for that possesses only legislative power; and the prerogative is something beyond or without the law, *extra legem*. If this be so, then it is clear that such a statute—which vested a jurisdiction and power over charitable uses in the chancellor as *grand almoner*, as it might have done in the Archbishop of Canterbury as the personal representative of the king—can not ever have been a part of the law of this state. In fact, of all the states of this Union, only in three of them has it been held that the statute of Elizabeth is in force—North Carolina, Kentucky and Indiana. In Massachusetts it has been held to be in force so far as applicable, and as modified by virtue of a colonial ordinance. (*Going v. Emery*, 16 Pick. 107.)

3d. The law of charitable uses, whether it existed by virtue of the 43d of Elizabeth, or before that time, formed no part of the common law as introduced into this state. (See *Going v. Emery*, 16 Pick. 107.)

4th. Whether the power over charitable bequests as exercised in England be derived from 43 Elizabeth, or existed prior to the passage of that statute, yet it was exercised as a part of the *prerogative power*, and not as a part of the jurisdiction of a court of equity. In the case of the Baptist Association v. Hart's Exec'rs, 4 Wheat. 1, Chief Justice Marshall, in commenting on the power of the courts of equity in England to enforce charitable bequests, says: "That it is a branch of prerogative and not a part of the ordinary powers of the chancellor is sufficiently certain." In the case of the Attorney General v. Flood, Haynes, 630, it is said, "The court of chancery has always exercised jurisdiction in matters of charity derived from the crown as *parens patriæ*." In

Fountain v. Ravenal, 17 How. 394, Chief Justice Taney, in speaking of the statute, says: "But this circumstance does not affect the question I am now considering; for, whether exercised *before or not*, yet, *whenever* exercised, it was in virtue of the *prerogative power*, and *not* as a part of the jurisdiction of the court as a court of equity." In Story's Equity Jurisprudence, § 1188, it is said: "The jurisdiction exercised by the chancellor in England, under statute of 43 Elizabeth, is *personal*, exercised as delegate of the crown, and not exercised in virtue of his ordinary or extraordinary jurisdiction in chancery." (See also Chittenden v. Chittenden et al., 1 Amer. Law Reg. 538; Att'y Gen'l v. The Mayor of Dublin, 1 Bligh, New Rep. 312; Moggridge v. Hachwell, 7 Vesey, jr., 63.) ✕

5th. If, then, the doctrine of charitable uses, as exercised by the chancellor in England, either before or after the passage of 43 Elizabeth, is not in force in this state, then charities in this state stand like any other trusts; and when a charitable trust is attempted to be created of so vague and uncertain a character that the *cestui que trusts* can not be definitely and accurately determined, and be able to ask the court to interfere for their protection, this trust, like any other trust, must fail. And this is the only proper and consistent doctrine, and the only rule that will not do more injury than it can produce benefit.

So thought Chief Justice Taney, in Fountain v. Ravenal, 17 How. 395-6. By our constitution, the ordinary jurisdiction of courts of equity only is conferred upon our courts. (See 10th section, 6th art. of Const.)

6th. But even admitting that the court has complete jurisdiction over the subject of charities, as derived either from 43 of Elizabeth or as inherent to its general powers, yet this devise is so vague and uncertain as to the objects of the charity, that it can not be supported without resort to the doctrine of *cy pres*, or, what is the same thing, devising a *scheme*. Let us examine this trust: "*In trust, to be and constitute a fund to furnish relief.*"



How is this relief to be administered? Is it by giving money?—by procuring food?—by furnishing means of transportation?—or in all these modes? The emigrant to Pike's Peak would have his wants best supplied by a set of mining tools. Who are the objects? They are first, "*poor emigrants*?" But emigrants from where? Is it meant emigrants from foreign lands, as the German newspapers insist it is; or does it mean emigrants from other states of the Union? or does include both classes of emigrants? There is another class who are to share in this bounty, to-wit: "travelers." These may be proper objects to bestow charity upon, or they may not. There may be persons "*traveling*" to whom "relief" might not be unwelcome, and yet they may be amply able to supply their own wants. "*Coming to St. Louis, on their way.*" Is it intended that those only who make this city a stage in their journey should be the sharers of this bounty; or is it intended that those who may come here to settle are also included? It would, by the next clause, seem to be only those who are temporarily here. "*Bona fide to settle in the west.*" How can the trustees be satisfied of the good faith of the applicants? It is only those who come in good faith to settle in the west that the bounty is provided for. "*The west!*" Where is it? Where are those persons to settle? Does it include emigrants to Iowa or Wisconsin; or is it confined to Kansas, Nebraska, Pike's Peak? Is the region bounded by the Rocky Mountains, or does it reach to the Pacific? Are the Mormon emigrants included? If this trust is abused by the city, as it most assuredly will be if this trust is sustained, what is the remedy? How is the court to interfere? Who are the persons who shall have the right to seek the interposition of the court? And granting that such a person could be found, and the court did find that the city had departed from the true intent and meaning of the testator in administering the trust, how is the court to interfere so as to protect such rights. Does the court of chancery in the state possess the power to make a scheme for the administration of this char-

*Cy mas*

ity? In 2 Iredell Ch. 261, the court say that the doctrine that the court can make a scheme for the administration of a charity is no part of our law. If this extraordinary power of the English courts is supposed to belong to our courts, then it is absolutely necessary that they should have the necessary machinery for carrying it into effect. This can only be done by a scheme.

7th. The trust can be supported, in any event, only by resorting to the doctrine of *cy pres*; and that has never been considered as having any foothold in this country. Every court, in every state of this Union, when the question has been presented, has uniformly repudiated the possession of any such power, with perhaps the exception of Indiana. (Moon v. Moon, 4 Dana, 357; McCauly v. Wilson, 1 Dev. Eq. 276; Bridges v. Pleasants, 4 Iredell Eq. 26; Andrew v. The N. Y. Bible Soc. 4 Sand. Sup. 156; Att'y Gen'l v. Wallace, 7 B. Mon. 641; Witman v. Lee, 17 Serg. & R. 93; White v. Fish, 22 Conn. 55.)

8th. The courts of this country and of England have refused to support trusts which were certainly as well defined, to say the least, as the present. (Wheeler v. Smith et al., 9 How. 55; Baptist Ass. v. Hart's Exec'rs, 4 Wheat. 1; Dashell v. Att'y Gen'l, 5 Har. & J. 392; Gray et al. v. Allen et al., 5 Humph. 170; Bridges v. Pleasants, 4 Ired. Ch. 25; Gallego v. Att'y Gen'l, 3 Leigh, 450; Fountain v. Ravenal, 17 How. 395; White v. Fish, 22 Conn. 55; The Phelps' Will case, 28 Barb. 122; Omany v. Butcher, Turn. & Rus. 260, 272; Ellis v. Sully, 1 Myle & Cr. 293; Williams v. Karshaw, 5 Clarke & Fin. 111; Kendall v. Grainger, 5 Beavan, 300; Morrice v. The Bishop of Durham, 9 Ves. 399; Owens v. The Methodist Church, 14 N. Y. 380; Beekman v. The People et al., 27 Barb. 272; Broome v. Yeall, 7 Ves. 50, note; 9 Ves. 406; 10 Ves. 27; Clarke v. Taylor, 21 Eng. Law & Eq. 308.)

9th. To create a fund for the relief or support of foreign paupers is against public policy. It is not our own poor who are proposed to be benefitted. It is not those who have

made their home among us, and have met with misfortune or sickness. It can never be efficacious as a charity, if administered according to the evident intent of the donor. It is to be doled out to those who, on their way to other places, may be supposed to need assistance. Other cities have passed very stringent laws against the introduction of foreign paupers, sending them back to Europe; and others have passed laws to prevent the introduction in their midst of those from other states and towns who were in the same condition. The increase of domestic pauperism is frightful. (See Report of New York Association for relief of the Poor, 1859, p. 17-21.) But here we are to create a fund for this purpose, and say to all those who are on their way to the west, "here, come and eat." Are we to hold out an invitation to all the indigent of the world to come here and have their wants supplied? The result of holding this good will be inevitable. It will be a corruption fund. Unrestricted in its exercise, it will be so managed, both in the offices it creates and the objects it selects, as best to subserve the interests of the party in power.

III. If this trust shall be adjudged by the court to be void, and yet the city is held to be competent to take as trustee, yet, as far as the personal property at least is concerned, the city will not hold it as trustee for the next of kin, but the probate court will at once distribute it to the heirs.

IV. If the court should hold that, though indefinite, this trust was good as a charity if there was a trustee competent to take, and should further come to the conclusion that the city could not take as trustee, then the court would not, as in ordinary trusts, appoint a new trustee. And this for the very good reason that there is no *cestui que trust* to ask for such intervention. If there is a *cestui que trust*, whether it be in the form of a charitable institution or individuals sufficiently well designated as the persons intended as the recipients of the bounty, then the court will appoint a new trustee. It knows with whom it is dealing, and can control and manage it as it will. In the case of a trustee competent to

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take, if the court hold that the charity, though indefinite, is not void, it says, the testator has placed his property in a person competent to take, and having his full confidence to administer this trust, provided, perhaps, by him with a plan for administering it. The title to the property has passed. But if the designated trustee can not take, then the court is asked to become an *actor*, to stretch out its arm to *protect* this indefinite trust. In several states this distinction is maintained. (Ayres v. Trustees of Methodist Ch., 3 Sand. S. C. 351, 365-6; Andrew v. N. Y. Bible & P. B. Soc., 4 Sand. S. C. 185-6; Owens v. The Methodist Soc., 14 N. Y. 405-6; Trustees, &c., v. Peaslee, 15 N. H. 317; Trustee v. Hart's Exec'rs, 4 Wheat. 50; Fountain v. Ravenal, 17 Howard, 395.)

*Leonard, Todd, Bay*, (city counsellor,) *Glover & Richardson*, for respondent. The following is the printed brief of Mr. Leonard:

These cases involve two general questions: *First*. Whether the city of St. Louis is capable of taking the legal ownership. *Second*. Whether, if the city be incapable, the present gift is nevertheless valid under our law as a donation to charity.

#### FIRST QUESTION.

In support of the capacity of the city not only to acquire, but also to retain the legal ownership, the following propositions are submitted: *First*. At common law, the capacity to take and hold property, both real and personal, is incident of common right to every corporation; and, by our statute of wills, corporations are made capable of taking land by devise, which was denied to them by the English statutes of the 32 and 34 Henry 8th. (10 Rep. 30; Kyd on Corp. 74; 2 Kent's Com. 281; Ang. & Ames on Corporations, § 145, and cases there cited.) *Second*. The mortmain acts do not disable corporations from taking real property, but only subject the lands that are acquired by corporation to forfeiture at the suit of the state, upon a direct proceeding for that purpose. (Per Wilmot, C. J., in

Lady Downing's case; Wilmot's Opinions, 9, 10.) *Third.* Our general corporation act of 1845 is a legislative license to all our corporations, present and future, to hold such real and personal property as the purposes of the corporation shall require; and the express provision in the city charter of 1851, (which was in force when this bequest took effect,) in reference to the power of holding property (art. 1, § 2) is a further license to this particular corporation to hold property, both real and personal, within the city, unlimited by the corporate necessities, and without the city for the specific purposes expressed in the charter; but this provision does not limit the general statute right, conferred upon all our corporations, of holding property, no matter where situated, or of what amount, that the purposes of the corporation may require. Assuming these propositions to be true—the correctness of which it is presumed can not be questioned—and admitting, for the present purpose, that the property embraced in the present gift exceeds what the purposes of the corporation require, still the title passed to the city, and is lawfully held by the corporation against all persons except the state, and is only defeasible at the suit of the state, even for the excess, in a direct proceeding on the part of the state for that purpose; and the effect of the act of March 12, 1859, is to relieve the city from the forfeiture so far as the state is concerned. (*Leazure v. Hilligas*, 7 Serg. & R. 319; *The Banks v. Poitiaux*, 3 Rand. 136; *Silver Lake Bank v. North*, 4 John. Ch. 373.

#### SECOND QUESTION.

Supposing the city to be incapable of taking the legal ownership, two general propositions are submitted in support of the validity of the bequest as a charity.

FIRST PROPOSITION.—By the English law, as it existed before the 4th of James I, this is a valid appropriation of the beneficial ownership to the accomplishment of the purpose expressed in the gift, without any reference to the capacity or incapacity of the city to take legal ownership; in other words, it is, under that system of law, a valid donation of the

property to the perpetual relief of that class of the poor of St. Louis that is described in the instrument of gift.

There are two elementary principles in the English law of charities upon which this general proposition rests. The first is peculiar to charities; the other is common to all property trusts, whether ordinary trusts, which are for the benefit of persons, or extraordinary, which are for the accomplishment of some charitable purpose in the legal sense of that term. *First*. That whenever property is given for the accomplishment of a charitable purpose, the application of it to that purpose will be judicially enforced; in other words, that a charitable purpose is a competent *cestui que trust*; and, *Second*. That whenever property is given in trust, the trust is valid, although the trustee appointed be incapable of taking the title.

*First Principle*.—Ordinarily, in all transfers of property, whether of the legal or beneficial ownership, the grantee must be a definite person, either natural or judicial, who is capable of standing in a court of justice and claiming a judicial enforcement of his rights; otherwise the transaction is utterly void on account of the uncertainty of the person to take. It is an exception to this rule in the English, and it is believed in every cultivated system of law, that, when property is given for the accomplishment of a proper public purpose, the application of it accordingly will be judicially enforced at the suit of the government through its appropriate officer. These charitable purposes—*piæ causæ*, as they are called in the civil law of modern Europe, (1 Kaufman's Makeldey, 150,)—are thus, it seems, according to our equity law, capable of taking property given for their accomplishment; and to this extent at least are, in the contemplation of courts of equity, substantially judicial persons. (Per Sir W. Grant, in *Morris v. Bishop of Durham*, 9 Ves. 404, 405; *Hill on Trustees*, 54; *Lady Downing's case*, *Wilmot's Opinions*, 1-35; *Incorporated Society v. Richards*, 1 Drury & Warren, 298; 2 Domat's Civ. Law, book 4, tit. 2, § 6.)

*Second Principle*.—In the creation and transfer of trust



property the appointment of trustee is matter of form ; the trust is the substantial, and the legal estate the formal ownership. In the language of Chief Justice Wilmot, "the trust is the substance, and the legal estate the shadow ; and as in the natural world the shadow follows the substance, so, in contemplation of equity, the legal title follows the trust wherever it goes." The result of this principle, which is equally applicable to charity as to ordinary trusts, is, that if there be no trustee originally appointed, or the person appointed be incapable or decline to accept, the courts supply the want of a trustee by directing those in whom the legal ownership rests to hold the property upon the declared trusts, or to transfer it to a trustee of their own appointment. (Sonly v. Clockmakers' Society, 1 Brown, C. C. 81 ; Adams' Eq. 36 ; per C. J. Wilmot, in Lady Downing's case, before cited ; per Chan. Sugden, in Incorporated Society v. Richards, before cited ; per Chan. Jones, in McCarty v. Orphan Asylum Society, 9 Cow. 484, 486.)

These principles being established, the only remaining question upon this part of the case under English equity law is, whether the purpose to which the property is here dedicated is such a purpose as that law allows to be a good charitable *cestui que trust* ; and if it be, whether it is described with sufficient certainty in the instrument of gift.

(a) The purpose of the gift. In 1804 Sir William Grant said that it was not every charitable purpose, in the ordinary signification of the word, that was a charitable purpose in legal contemplation ; that, in its largest meaning, charity denoted all the good affections that men ought to bear to each other ; in its more restricted and common sense, relief of the poor ; but that, in equity, those purposes only were considered charitable that were enumerated in the 43d of Elizabeth, or which by analogy were deemed to fall within its spirit. (Morris v. Bishop of London, 9 Ves. 405.) In 1824 the Master of the Rolls declared that it was the source from which the funds were derived, and not the mere purpose to which they were dedicated, which constituted them

charitable; and that funds derived from the gift of the crown, or the gift of the legislature, or from private gift, for any legal, public or general purpose, were within the equity of the statute. (Att'y Gen'l v. Heelis, 2 Sim. & Stu. 77; Att'y Gen'l v. Brown, 1 Swanst. 265; Nightingale v. Golburn, 5 Hare, 484.) As, however, the relief of the poor stands at the head of the list of legal charities enumerated in the statute, it is of course admitted that the purpose of the present gift—the perpetual relief of the poor of St. Louis—is a charitable purpose within the meaning of the law, and a competent legatee of the present bequest.

(b) The sufficiency of the description. This gift, however, is not for the relief of the poor of St. Louis generally, but for a particular class—the poor that come here from abroad to settle in the west; in the language of the testator, “*poor emigrants and travelers coming to St. Louis on their way, bona fide, to settle in the west;*” and this attempt of the donor to limit his bounty to the class of persons he wished to take care of, and his omission to provide a scheme for applying his bounty to their relief, produces the uncertainty upon which the whole argument against the validity of the gift rests. The objection that the beneficiaries of the gift are too vaguely described is not answered here by the proposition, that in charity gifts general charity without any specification whatever is sufficient, nor by an appeal to the English *cy pres* doctrine—which executes the supposed general charitable purpose of the grantor as near to his specific intention as possible; but the answer that is here relied upon is, that the objects of the charity are indicated with sufficient certainty to enable the court to see that the substantial intention of the giver is carried into effect. It may not, however, be improper here to refer to these doctrines of the English charity law, in order to distinguish them from the doctrine that is applicable to the present case. Charity it seems is a favored donee; and, accordingly, not only is a gift to general charity, without a trustee or any specification of objects, valid, (Clifford v. Frances, Freeman, 330; Frier v. Peacock,

Finch, 245, reported as Att'y Gen'l v. Mathews, 2 Lev. 167; per Lord Eldon, in Moggridge v. Thackwell, 7 Ves. jr., 75;) but in gifts to specific charities, if the particular purpose be unlawful, (Att'y Gen'l v. Baxter, 1 Vernon, 248; DeCosta v. Depaz, 1 Amb. 228,) or has ceased to exist, (Att'y Gen'l v. City of London, 3 Brown, C. C. 172,) or is not sufficient to exhaust the fund, (Att'y Gen'l v. Minshull, 4 Ves., jr., 14,) or has not been designated by the document, or party appointed for that purpose, (Moggridge v. Thackwell, 7 Ves., jr., 36; Att'y Gen'l v. Siderfin, 1 Vernon, 224; Mills v. Farmer, 1 Mer. 54;) or can not for any reason whatever be ascertained, or if ascertained can not be executed; in all these cases, the principal intention of the giver is presumed to have been to give *to charity*, and this supposed general charitable purposes is effectuated *cy pres*, as near the particular intention as possible. But if it appear that the individual charity was the only one in the donor's mind, and that has failed, the property results to the donor, (Adams' Eq. 71; Cherry v. Mott, 1 Myl. & Cr. 124; Att'y Gen'l v. Moulton, 2 Ves., jr., 387; Mills v. Farmer, 19 Ves. 483;) and all this doctrine is derived from the Roman law. (2 Domat, 4 book, tit. 2, § 6; 1 Swimb. on Wills, 105, part 1, § 16; Digest 33, tit. 2; De usu et usufr. 16.) Under the English law, in the first class of cases, the king, as *parens patriæ*, is the trustee, and designates the particular charity to which the fund shall be applied; but in the other cases, the court of chancery dispenses the charity and executes the general charitable purpose as near the particular intention of the giver as possible. (Moggridge v. Thackwell, 7 Ves., jr., 75.) Under our system, the legislature is competent to designate the particular charity, where the gift is general; (Att'y Gen'l v. Jolly, 1 Richard. Eq. R. 108;) and there does not seem to be any objection in principle to the English *cy pres* doctrine—although it has been carried, no doubt, in the early English cases, to an unreasonable extent, much further than has been approved by modern English judges, and further, no doubt, than the American courts would go.

The present, however, is not a case for the application of these doctrines. The gift is not to charity indefinitely, but for the relief of a specific class of persons; neither is the class to be relieved—"poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the west"—so imperfectly described that the court is called upon to abandon the specific purpose of the giver, and to execute his supposed general charitable purpose in favor of some other object. It would seem quite impossible to argue that the courts of justice can not ascertain what class of persons were intended by these words, and that this charity must fail upon this ground. They are plain English words, and describe a class of persons, who, at the very time that this will was made, were being relieved by voluntary associations of charitable persons in this city formed for that purpose; and certainly no plain man on the street would hesitate in answering the question, if it were put to him. In Lady Hewley's charity, which has lately been the subject of so much discussion in the English courts, the class of persons and objects provided for were described as "*poor and godly preachers of Christ's Holy Gospel, poor and godly widows of the same class of persons, to provide for the preaching of Christ's Holy Gospel in poor districts and places, to assist in the education of young persons intended for the ministry of Christ's Holy Gospel, and to assist poor and godly persons in distress*"—certainly quite as indefinite as the present description; and the question discussed was, not whether the charity was void on account of the difficulty of ascertaining the donor's intention, (that short mode of disposing of the matter did not occur to English common sense,) but what kind of evidence might be laid before the court to aid them in determining the classes of persons and objects that were intended by the donor. (*Shore v. Wilson*, 9 Clark & Finnilly, 499-582.) In charity trusts, the persons to be benefitted are always uncertain. All the certainty required is a general description of the class of persons who are to receive the donor's bounty, not a particular designation of

the individuals; it is enough that there is such a general description of the objects of the charity as will bind the conscience of the trustee, and not leave him an uncontrollable power of disposition, which is ownership. (Shelford on Mortmain, ch. 5, § 4.) And certainly the objects of the present charity are quite as definite as they are in a great many cases to be found in the books, in which the trusts are adjudged good and enforced accordingly. (Bartlet v. Nye, 4 Metc. 387; Going v. Emery, 16 Pick. 107; Att'y Gen'l v. Jolly, 1 Rich. Eq. R. 105; Att'y Gen'l v. Wallace's Devisees, 7 B. Monr. 620; City of Richmond v. The State, 5 Porter, Ind. 636; Amer. Bible Society v. Wetmore, 17 Conn. 188; State v. Jerard, 2 Ired. Eq. 210; Magill v. Brown, Brightley, 359, note; Pickering v. Shortwell, 10 Barr, 23; Domestic & For. Miss. Society's Appeal, 30 Penn. 434; Att'y Gen'l v. Comber, 2 Sim. & Stu. 93; Baker v. Suttan, 1 Keen, 224; Ommann v. Butcher, 1 Turner & Russell, 260; Milford v. Reynolds, 1 Philips, 185; Wicker v. Hume, 14 Beav. 522; Lyons v. East Ind. Com. 1 Moore's Priv. Coun. Cases, 175.)

Supposing, however, that the beneficiaries of this charity are sufficiently indicated in the gift, it is then objected to its validity that the manner in which the relief is to be administered to them is not provided, but is left altogether at large. The answer to this is, that when property is given in trust, the specific purpose to be accomplished is the substance of the gift; and the manner in which this purpose is to be effected is merely formal, and belongs to those who are entrusted with the execution of the trust—either the original trustees, or, in default of them, the courts of equity. Now in charity trusts, there are two sorts of authority—one as to the internal government of the charity, the other as to the management of the estates. In the former, the dispensers of the charity, those appointed by the founder for that purpose, are absolute and uncontrollable, except as they are limited by the expressed will of the founder; but, in reference to the estates, they are accountable to the court of chancery, upon the universal principle of English equity law, that all per-



sons who hold property in trust are accountable in equity for their management of it. (*Att'y Gen'l v. Locke*, 3 Atk. 165, per Lord Hardwicke; *Green v. Rutherford*, 1 Ves., sr., 470; *Lewin on Trusts*, 392, chap. 20; *Foster v. Foster*, 2 P. Wil. 326; *Att'y Gen'l v. Heelis*, 1 Mylne & Cr. 627.) One may give his property to a specific charity without appointing any one to take the property and dispense his bounty; or he may give it to a trustee for the same purpose, without any further direction; or he may give it to a specific charity, accompanied by a scheme regulating the manner in which the charity shall be dispensed; and all these are valid dispositions of the property. In the first class of cases the charity is dispensed according to a scheme provided by the courts in the exercise of their power to execute trusts where there is no other trustee; in the second class, the trustee dispenses the charity according to his own scheme; and in the third class, it is dispensed by the trustee according to the scheme provided by the founder; and in the two last cases it is the duty of the courts to see—in the one, case that the scheme provided by the trustee applies the fund to the purpose of the trust and to no other—and in the other, that the fund is applied to the purposes of the gift, according to the scheme of the founder. The purpose of a scheme is not to designate the beneficiaries of the gift, but to provide the manner in which the fund shall be distributed to them. In gifts to a specific charity, the particular object to be accomplished is, as in ordinary special trusts, the substance of the gift; but the manner in which the purpose is to be effected is merely formal. This is sometimes provided by the founder of the charity, and must then be observed; at other times it is left to the trustee, and is then a proper subject for the exercise of his discretion; and at other times it is devolved upon the courts, either for want of a trustee originally, or because the trustee appointed can not, or will not, or ought not to execute the trust. Girard founded a charity for the education of poor orphan children, and appointed the City of Philadelphia to be his trustee, and provided a scheme for dispensing



it. Smithson, a British subject, founded a charity for the establishment at Washington of an institution for the increase and diffusion of knowledge among men, and appointed the United States to be his trustee, but left it to their discretion to adopt such a scheme for effecting the proposed object as they should from time to time judge best; and there are instances, in the books, of charities founded for a specific purpose, without either a trustee or a scheme. Judge Mullanphy has given one-third of his estate to this city in trust, to constitute a fund for the relief of poor emigrants and travelers coming here to settle in the west; but, instead of providing a plan for dispensing it for all time to come, he has, with less personal vanity and more practicable wisdom than was shown by Girard, left the details as to the application of his bounty to the discretion of the living community where it is to be dispensed, that they might from time to time be changed to meet the existing condition of things. In the *President of the United States against Drummond*, (referred to in *Wicker v. Hume*, 14 Beavan, 517,) the question before the British Rolls Court in May, 1838, was as to the disposition of the fund given by Smithson to the United States. The purpose of the gift was very general, and no plan for effecting it was provided by the donor; the fund was to go beyond the jurisdiction of the court; and finally the question was one of private property between British subjects and a foreign state, and involved a large sum. The gift was established, however; and the charity is now being dispensed by our national government according to a scheme provided by the United States, and stands quite as much a monument of the impartiality of British judicial justice as of private British munificence. But here it is argued that a charity almost as large and of more daily necessity and utility—given at large to this city for the relief of that class of poor persons that emigration will bring here for years to come—can not prevail for want of authority under our law to provide for its applications, either in the city, appointed by the donor for that purpose, or in the courts of the state. The want of a scheme

is an objection that was never suggested in an English court, and one that has rarely, if ever, been made in an American court, although, during the period that the doctrine of the Baptist Association case (to be hereafter referred to) prevailed—that *the persons to be benefitted by the gift must be specified with sufficient certainty to enable them to stand in a court of justice*, in gifts to unincorporated societies—the circumstance, that these bodies usually have a scheme by which they effect their charitable purposes, may have been referred to in order to obviate the objection of uncertainty in reference to the beneficiaries, which otherwise, according to the doctrine of the Baptist Association case, would have been fatal.

The construction that common sense would put upon this gift is that the city is to take the legal ownership, and to apply the revenue to be derived from the property to the relief of the persons indicated in the gift; and the question is whether the law will allow the gift so to take effect. The trust, we have seen, is valid although the city be incapable at law of holding the property; and it is now insisted that the city may, under the general law and independently of the act of March 12, 1859, dispense the revenue although they are incapable of owning the fund. The capacity of the city to execute the trust is one thing, and their capacity to take the property another; and these questions depend upon different considerations. Although, at one time, it was supposed that corporations were incapable of executing a trust, the general rule now is that they may execute any trust not foreign to their creation. (Ang. & Ames on Corp. 166, 167, 168; Att'y Gen'l v. Governors of Foundling Hospital, 2 Ves., jr., 46; Green v. Rutherforth, 1 Ves., sr., 468; Trustees of Philips' Academy, 12 Mass. 556; First Parish in Sutton v. Cole, 3 Pick. 237, 238; Chapin v. School District 35, N. H. 445.) And accordingly it was laid down by Justice Story, in the Girard charity case, 2 How. 189, 190, that municipal corporations may execute any trust germane to the purpose of their creation; and, as this city *may* provide for their poor,

they may of course dispense a perpetual charity founded for the relief of this class of persons. But if the city were incapable not only of the legal ownership, but also of executing the trust, it would then be the duty of the proper court of equity to give directions as to the application of the fund by a proper scheme for the purpose.

SECOND PROPOSITION.—The principles of the English charity law, which are relied upon in support of the present bequest, are in force in this state, either as part of the English unwritten law, or of the statute law of a general nature; and not local to that kingdom, passed before the 4th of James I.

*First.* They are not derived from the statute of Elizabeth, but are part of the common law. 1st. Such is the opinion of Chancellor Sugden, (*Incorporated Society v. Richards*, 1 Drury & Warren, 298, 320; *Sausse & Scully*, 607, decided in 1841,) and of Judge Story, (*Girard charity case*, 2 How. 194, 196, decided in 1844,) expressed judicially in cases where the question was directly up and elaborately argued; and certainly no opinions upon this question are of higher authority than the opinions of these two judges, expressed under such circumstances, and with all the information that recent and very thorough investigation had brought to bear on the subject. 2d. The very language of the statute is in conformity with this opinion. If the matter were altogether new, and a construction were now for the first time to be put upon the words of the law, they could not be construed as introducing a new rule upon the subject of charities, but only as providing a more efficient remedy for violations of the existing law. I refer the court to the remarks, upon this subject, of Chancellor Sugden, (*Incorporated Society v. Richards*, 1 Drury & War. 301, 306,) of Lord Redesdale, Att'y Gen'l v. Dublin, 1 Bligh, N. S. 37,) and of Chief Justice Denio; (*Williams v. Williams*, 4 Seld. 542, 543;) although it is a little remarkable that Judge Tucker, in *Galligo's Exec'rs v. Att'y Gen'l*, 3 Leigh, 469, relies upon the same language in support of the contrary opinion. 3d. Although there is no direct adjudication upon this question—for the obvious reason

that it has never been a material question in the English courts—yet the weight of English judicial dicta is decidedly in favor of that opinion. We have the opinion of Sir Joseph Jeckyll, in *Eyre v. Countess of Shaftsbury*, 2 P. Wil. 119; of Lord Northington, in *Tancred v. Att’y Gen’l*, 1 Eden, 10, Ambler, 351; of Lord Eldon, in *Att’y Gen’l v. The Skinners Company*, 2 Russ. 407; of Sir John Leach, in the *Brentwood School case*, 1 Myl. & K. 367; of Lord Redesdale, in *Att’y Gen’l v. Corporation of Dublin*, 1 Bligh, N. S. 347; of Chief Justice Wilmot, in *Lady Downing’s case*, *Wilmot’s Opinions*, 24; and of Lord St. Leonards, then Chancellor Sugden, in *Incorporated Society v. Richards*, before cited; against the opinion of Lord Loughborough, in *Att’y Gen’l v. Boyer*, 3 Ves., jr., 714. 4th. Judge Baldwin enumerates forty-six different trusts (uses, as they were then called,) that had been declared by statute, or judicial decision, before the 43d of Elizabeth, to be valid charitable trusts, although that statute only enumerates twenty-one; (*Magill v. Brown*, *Brightly’s R.* 394, note, decided in 1833;) and the chancery cases recently brought to light by the researches of the English Record Commissioners (an abstract of fifty of which may be found in the report of the Girard charity case) show quite conclusively that these charitable trusts not only existed in fact before the statute of Elizabeth, but were also before that time protected and enforced in chancery like other trusts; and Judge Story has remarked, (2 How. 195,) that in some of these cases there was no trustee, and that the trusts themselves were vague and indefinite. 5th. These facts only establish historically the state of English charity law to have been, before and at the passage of that statute, at that stage of its development that we might fairly have inferred that it would then have reached. A legal system in relation to charity trusts had before that time been developed in the law of christian Europe; and, as the practice of giving property to public uses, both goodly and superstitious, (as they were distinguished in the old English statutes,) as well as to private uses, had prevailed very extensively in England long

before the reign of Elizabeth, and as these private uses had before then been protected and enforced in chancery upon principles drawn from the Roman law, it was to be expected that in a christian community, where charity was so highly extolled, charitable trusts would also be protected and enforced by the same court, (especially while clerical chancellors presided there,) upon principles applicable to public trusts, and drawn, too, from the same source. (2 Domat. 532, part 2, b. 4, tit. 2, § 6; 1 Swinb. 105, part 1, § 16.)

*Second.* If it be true, however, that these principles of the English law are not a part of the common law, but derive their vitality exclusively from the statute of Elizabeth, it is then insisted that this act, to this extent at least, is in force in this state by the terms of our statute introducing the English law. The American colonists brought with them the law of England, both written and unwritten, of a general nature, and not local to the mother country. (Blankard v. Galdy, 2 Salk. 411; 1 Kent's Com. 472; Commonwealth v. Knowlton, 2 Mass. 534, 335; Commonwealth v. Leach, 1 Mass. 60; Bogardus v. Trinity Church, 4 Paige, 198; Patterson v. Winn, 5 Peters, 241.) And Virginia acted on this principle in her ordinance of 1776, declaring what part of the English law was in force there; and our territorial legislature, in substituting the English in lieu of the Spanish law, acted upon the same idea, and adopted the very language of the Virginia ordinance. (Terr. Act, 1816.) If, therefore, charity trusts like the present were not valid before the statute of Elizabeth, and that act is to be considered as the source from which they derive their validity, so far the statute must be considered as general, and made in aid of the common law, and of course in force in this state; while the special remedy provided in it is local, and forms no part of the general law of England which the British colonists brought with them, and which we have expressly adopted by statute; and this view of the statute of Elizabeth has been expressly adopted in several of the states. (Going v. Emery, 16 Pick. 115, 117; Whitman v. Lex, 17 Serg. & R. 88; McCord v.



Ochiltree, 8 Blackf. 15; Moore's Heirs v. Moore's Devisees, 4 Dana, 361; Carter v. Balfour's Adm'r, 19 Ala. 829.)

The result reached, I think, by the views here presented is, that the principles of English charity law, to which I have referred in support of the present gift, are part of the general law of England, and such, it is believed, is the present state of judicial opinion upon this question in almost every state of this Union. The law applicable to charitable trusts had been very little considered in the United States before the Baptist Association case, 4 Wheat. 1, decided in 1819. The only previous case to be found is one in Massachusetts, Bartlett v. King, 12 Mass. 577, decided in 1815, where the validity of a charity trust came up in a real action, and the court contented themselves with holding the trust to be valid, without undertaking to determine how it was to be enforced in Massachusetts, where the courts had no chancery powers. The decision in the Baptist Association case was to the effect that the English law of charities—so far as it upheld donations to charitable purposes, *where there was no trustee to hold the legal title, and where also the cestuis que trust were not definite persons capable of standing in a court of justice and claiming their rights*—was derived exclusively from the statute of Elizabeth, and that this statute having been expressly repealed in Virginia, where the transaction arose, the gift, being of the character indicated, was void. (Per Story in Girard charity case, 2 How. 192, 193.) The doctrine of the case was, that the principle of the English charity law—that *a charitable purpose, without a trustee or a definite beneficiary, was a competent cestui que trust*—was derived from the statute and formed no part of the English equity law. This opinion was reversed in 1844 by the opinion delivered in the same court, in the Girard charity case; and the doctrine was there announced that the principle of the English charity law law here referred to was part of their equity system, and was not derived from the statute, as had been supposed in the former case.

During this interval, however, (from 1819 to 1844,) the



subject of charities underwent a good deal of judicial discussion in the United States, and the English doctrine was adopted and acted upon in Massachusetts, Vermont, Connecticut, New York, Pennsylvania, North Carolina, Kentucky and Ohio as part of their equity law, notwithstanding the decision in the Baptist Association case, although the case itself was rather evaded than directly overruled. (*Going v. Emery*, 16 Pick. 107; *Burbank v. Whitney*, 24 Pick. 148; *Bartlett v. Nye*, 4 Met. 378; *Burr's Ex'rs v. Smith*, 7 Verm. 250; *Coggershall v. Pelton*, 7 John. Ch. 292; *Potter v. Chapin*, 6 Paige, 649; *McCarte v. Orphan Asylum Society*, 9 Cowen, 444; *Whitman v. Lex*, 17 Serg. & R. 93; *McGirr v. Aaron*, 1 Penr. & Watts, 50; *City of Philadelphia v. Elliott and others*, 3 Rawl. 171; *Martin v. McCord*, 5 Watts, 494; *Griffin v. Graham*, 1 Hawks, 96; *State v. Jerard*, 2 Ired. Eq. 210; *White v. University*, 4 Ired. Eq. 21; *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; *Curling's Adm'r v. Curling's Heirs*, 8 Dana, 38; *McIntyre Free School v. Zanesville C. & M. Co.* 9 Ohio, 286.) The Baptist Association case, however, exercised great influence during all this time upon judicial opinion throughout the United States, and was adopted and followed in Maryland and Virginia to its utmost limit. In the Maryland case, (*Dashiell v. Att'y Gen'l*, 5 Har. & John, 401,) bequests to competent trustees—one in trust "to feed the poor of a specific religious congregation in Baltimore," and the other "to feed the poor children of a certain county in the state, while attending a particular school in the county"—were declared void, on account of the indefiniteness of the beneficiaries; and in the Virginia case, (*Galligo's Exec'rs v. Att'y Gen'l*, 3 Leigh, 476,) a bequest to trustees to buy a lot in Richmond upon which to erect a church for the Roman Catholics of the city, was declared void for the same reason; and it was also followed in Tennessee, in *Green and others v. Allen and others*, 5 Humph. 170, which was determined by a divided court very shortly after the Baptist Association case had been overruled. The discussions in these cases, and in the cases that occurred during

the same period in the federal courts, (Beatty v. Kurtz, 2 Pet. 566; Ingles v. Sailors' Snug Harbor, 3 Pet. 99; Cincinnati v. White's Lessee, 6 Pet. 432, and Magill v. Brown, Brightley's R. 359, note,) together with the thorough investigation that the subject underwent in the Girard case, produced that change of opinion to which I have referred. And, since the Girard case, the doctrine that a charitable purpose is a competent *cestui que trust*, and that gifts to such purposes, without a trustee or definite persons to take as beneficiaries, has been adopted in South Carolina, Alabama, Indiana, Georgia, New Jersey, Rhode Island, Iowa and New Hampshire; (Attorney Gen'l v. Jolly, 1 Rich. Eq. 101; 2 Strob. Eq. 381; Carter & wife v. Balfour's Adm'rs, 19 Ala. 821; McCord v. Ochiltree, 8 Blackf. 15; City of Richmond, v. The State, 5 Ind. 336; Sweeny v. Sampson, 5 Ind. 446; Beal v. Fox's Exec'rs, 4 Georgia, 428; McBride v. Elmer's Exec'rs, 2 Halst. Ch. 107; Derby v. Derby, 4 R. I. 414; Johnson v. Mayne, 4 Iowa, 180; Chapman v. School District, 35 N. H. 445;) and has been still further illustrated and applied in Massachusetts, Pennsylvania, Kentucky and Ohio, in cases that have occurred in their courts since 1844. (Washburn v. Sewall, 9 Met. 282; Nelson v. Cushing et al., 2 Cush. 519; Methodist Church v. Remington, 1 Watts, 218; *ex parte* Cassell, 3 Watts, 440; Martin v. McCord, 5 Watts, 494; Weight v. Sim, 9 Barr. 437; Pickering v. Shotwell, 10 Barr. 23; Att'y General v. Wallace's Devisees, 7 B. Monr. 619; Zanesville C. & M. Co. v. City of Zanesville, 20 Ohio, 483.) Nor has the doctrine been since denied in any state except New York. There the conflict of decision upon this subject that had occurred in the courts of original jurisdiction subsequent to the cases in Johnson, Cowen and Paige, to which I have referred, (Kniskern et al. v. Lutheran Churches of St. John and St. Peter's et al., 1 Sand. Ch. 439; Shotwell, Exec'r, v. Mott et al., 2 id. 46; Ayres v. Methodist Church, 3 Sandf. S. C. 351, and Andrew v. N. Y. Bible and Prayer-Book Society, 4 id. 156,) was finally settled by the court of appeals in 1853, in favor of the doctrine in the

Girard case ; (Williams v. Williams, 4 Seld. 550 ;) but only to be unsettled again in 1856, in Owens v. Mis. Soc. of M. E. Church, 4 Kernan, 393. The decisions made in Maryland and Virginia (in both of which states the statute of Elizabeth had been expressly repealed) upon the authority of the Baptist Association case, still continue to be the law in these states ; but in Tennessee, two cases, (Dickson v. Montgomery, 1 Swan, 368 ; and Franklin and others v. Armfield and others, 2 Sneed, 357,) very recently decided there, can hardly be reconciled with the doctrine of Green and others v. Allen and others, in 5 Hum. 170, and seem to recognize as the law of that state the principles of the English charity law to the full extent that is necessary for the support of the present gift. In Connecticut and North Carolina, where the principles of the English charity law have always prevailed from the very origin of these communities, the adjudged cases are sufficient for the present bequest ; (Amer. Bible Society v. Wetmore, 17 Conn. 188 ; Griffin v. Graham, 1 Hawks, 96 ; State v. Girard, 2 Ired. Eq. 210 ;) yet other cases in these states stop short of what is believed to be the law of public charities. (White v. Fisk, 22 Conn. 52 ; White v. The University, 1 Ired. Eq. 21 ; Bridges v. Pleasant, 4 Ired. 27.)

Having now gone through with the principles and authorities applicable to charity gifts which are necessary to sustain the present bequest, I close the argument by recalling the attention of the court to two cases, (an American and a British case,) in which all these principles are recognized and applied, and which are so similar in their circumstances to the present case, that I might perhaps have safely relied upon them alone. In the British case—Incorporated Society v. Richards, before cited, 1 Drury & Warren, 298—the question was as to the validity, *under English equity law, independent of the statute of Elizabeth*, of a charity bequest to legatees incapable of taking by will and for beneficiaries that were altogether indefinite ; and the opinion in favor of it was by Sir Edward Sugden. In the American case, (Bartlett and others v. Nye and others, before cited, 4 Metc. 387, the ques-

tion was as to the validity, *under the law that the British colonists brought with them to this continent*, of a direct devise of real property to an unincorporated society, (the American Bible Society,) for the charitable purposes of the society, and the supreme court of Massachusetts established the gift. These two cases answer every objection that has been taken to the present bequest. There was no transfer of the legal ownership; the beneficiaries were altogether indefinite, and no scheme was provided for administering the charity, nor was any authority expressly conferred upon any person for this purpose; but such authority was implied from the gift, which, although ineffectual to pass the legal title, was deemed sufficient to constitute the legatees the dispensers of the charity.

The clear result of the whole matter, both upon principle and the authority of the adjudged cases, British and American, would seem to be that the bequest is a valid trust, although the city be incapable of taking the property and of dispensing the charity; and that, in that event, the proper court will dispense it, according to a judicial scheme, through new trustees of their own appointment; but if the city be competent to dispense the charity, as she is expressly declared to be by the act of March 12, 1859, (Sess. Acts, 1858-9, p. 280,) but incapable of the legal ownership, the court will appoint trustees to manage the property, and leave the city to distribute the revenue according to their own scheme; and that then the city may either take the direction of the proper court in advance, by submitting their scheme, or they may act in the first instance without such direction, subject, however, to judicial control as to the application of the funds to the objects of the charity.

In conclusion, I may be permitted to say that the question now to be settled is of great public interest, not only on account of the large amount of property involved, but also because the law of this state in reference to public charities is now for the first time to be announced and applied in this tribunal. Arguments drawn from the policy of encouraging

gifts of this character can have no weight here, and are expressly refrained from. This policy has prevailed in all civilized communities, and has covered the older states of this Union with charitable institutions for bettering the condition of men; but this is not a matter for consideration in this court, whose duty it is, not to provide laws for the regulation of the affairs of men, but to apply the existing laws, as they find them, to the transactions of actual life.

Scott, Judge, delivered the opinion of the court.

Bryan Mullanphy died on the 15th of June, 1851, leaving a will, of which here follows a copy:

"I, Bryan Mullanphy, do make and declare the following to be my last will and testament: One equal undivided third of all my property, real, personal and mixed, I leave to the City of St. Louis, in the state of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, *bona fide*, to settle in the west. I do appoint Felix Costé and Peter G. Camden executors of this, my last will and testament, and of any other will or executory devise that I may leave. All and any such document will be found to be olograph, all in my own handwriting. In testimony whereof witness my hand and seal. Bryan Mullanphy, [seal]."

This will was attested lawfully, and was admitted to probate. It will be seen it was without date. The subscribing witnesses testified that they signed it as such in August, 1849. The estate was a large one, consisting of money and lands, a large portion of which was out of the limits of the city. The testator never married, and his sisters, five in number, were his heirs at law. This suit was commenced by petition in partition by the husband of one of the sisters, who were all married, against the remainder of them, and the City of St. Louis, claiming under the will, was made a party. There was a judgment for partition, and the portion of the real estate devised in trust to St. Louis was set



apart to her. Upon this judgment a writ of error was sued out from this court.

By an agreement between the parties, this cause is to be considered as though the points arising in it had been presented in a way in which the court could properly take cognizance of them; that this court shall not only examine the only point presented by the record, whether the city could take the land by devise in trust, but also the question whether the devise is such a one as under our laws is valid, it being for the benefit of *cestuis que trust* who are indefinite and uncertain.

The question whether the city can take the land in trust is a compound one, and involves, first, the inquiry whether, under her charter, she can take the land; and secondly, although she may have the capacity to take it purely as a gratuity or for her own use, yet whether she can take and hold it for the object mentioned in the testator's will, thereby making herself a trustee in respect to it. We will first consider the question whether the City of St. Louis, being a body corporate, can, under our laws, take lands by devise, leaving for future consideration the result that would follow from its being established that the city could not take the land.

By the first section of the act concerning corporations, (R. C. 1845,) the incidents of all corporations are enumerated, one of which is "to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." The third section of the same act provides that "in addition to the powers enumerated in the first section of this article, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." By the charter of St. Louis, passed 3d March, 1851, section two of the first article, it is enacted that the city "may purchase, receive and hold property, real and personal,



within said city, and may sell, lease, or dispose of the same, for the benefit of the city; and may purchase, receive and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead of the city, also for the erection of water-works to supply the city with water, and also for the establishment of a hospital for the reception of persons infected with contagious and other diseases, also for a poor-house, work-house, or house of correction; and may sell, lease or dispose of such property for the benefit of the city."

v There is nothing in our statute concerning wills which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons. The section of the statute concerning corporations above cited, in which are enumerated the incidents which result from the creation of a body politic or corporate, must be regarded as a substitute for the incidental powers which by the common law were annexed to every corporation. A corporation can do no act which is not expressly or impliedly authorized by its charter, or by the act under which it is created. The City of St. Louis is authorized to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in her charter. This is by the general law concerning corporations. No amount being fixed by her charter, she can hold as much as shall be necessary for the purposes for which she was created a body corporate. Although it has been held, where a corporation is prohibited from taking by devise and is empowered to take by purchase, the word "purchase" shall be construed in its vulgar and not its legal sense, which signifies an acquisition by any other mode than by inheritance, yet that principle is not applicable under our law, which does not prohibit devises to corporations.

It is not denied but that the city, under her charter, could take all the lands devised to her within her limits, if the devise had been to her own use, uncoupled with the trust to

which, by the terms of the devise, it was subjected. But it is maintained that, as to the lands outside of her limits, she could only take them for the specific purposes enumerated in the section to which reference has been made; and it is insisted that the enumeration of the particular purposes for which lands may be held beyond the limits of the city is an exclusion of all other purposes for which lands thus situated may be held. But the force of this argument is broken, when we consider that, independently of the powers conferred by the charter, the city had, under the section of the act concerning corporations above cited, a power to hold such lands, without regard to their locality, as may be necessary for the purposes of the corporation; and the third section of the same act declares that such power shall be in addition to any power that may be conferred by the charter. Statutes *in pari materia* are to be construed so that they may all stand. A repeal of the statutes by implication is not favored in law. Lands held by the city beyond her limits would be held by her as by any individual proprietor, and her powers over them would only be commensurate with those enjoyed by private owners. But, by authorizing her to hold lands beyond her limits for objects intimately connected with the purposes of the corporation and highly necessary for her prosperity and welfare, it was intended that, over such places, she should exercise such police powers as would be required in order to make them answer the purposes for which they were designed. ✓

We have no statutes of mortmain. The apprehension of any evils resulting from the ownership of lands by corporations has not been evinced by any general legislation. The law of this state regulating banks and banking institutions has not only omitted the imposition of any restrictions on the power of the banks to acquire real estate, but has exempted them from the provisions of the first article of the act concerning corporations, to which reference has already been made, thereby leaving their powers in regard to this matter as they stood at common law, which gave corporations an

unlimited power of taking and holding real estate. Indeed the great and still increasing assimilation of real to personal estate for all the purposes of commerce has, in a great measure, taken away the necessity for such restraints. Land at this day is not what it was in the days of feudalism. It is no longer clothed with the privileges, nor encumbered with the burdens, of that time; nor is it so far removed from the influence of commerce. It is, therefore, no matter of surprise that the statute concerning corporations, in enumerating the incidents necessarily annexed to them, placed real and personal estate in the same connection. These considerations, together with the fact that St. Louis is a municipal corporation, whose powers may be resumed at any time by the legislature, must produce the conviction that no policy is subserved in prohibiting her from taking real estate.

But although there may be no more policy, at this day, in the laws prohibiting corporations from purchasing real estate than in restraining them from diverting their capital to any other unauthorized purpose, yet, if the legislature has forbidden it, we are bound to enforce the prohibition. Availing themselves of this principle, the plaintiffs in error maintain that the city being authorized to purchase such lands as may be necessary for the purposes of the corporation, and the lands outside of her limits not being necessary for such purposes, she can not take them. Now, whatever may be the meaning of the word "necessary" — for it has different significations, meaning sometimes *indispensably requisite*; at others, *needful*, *requisite*, *incidental*, or *conducive to*; and it is admitted that there are cases in relation to land held by corporations in which that word has been made to bear the first of these significations—yet the meaning of that word is not involved in this proceeding. Whether these lands are necessary for the corporation is a question that can only arise in a proceeding instituted by the state against the city for abusing her right to purchase lands. The city had a power to purchase; if that power has been exceeded, then it has been violated, and the city charter may be forfeited in a

suitable proceeding; and until that is done, she will hold the land. The city may hold lands outside her limits for certain purposes. Shall she be compelled to contest, with every occupant who may get possession of them, her right to take and hold lands? There being a right in the city to purchase, if there is a capacity in the vendor to convey, so soon as a conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city. The law is only directory in relation to corporations taking lands. It imposes no penalty, nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. The city is duly incorporated, with authority to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require; and if, in holding and purchasing real estate, she passes the exact line of her power, it belongs to the government of the state to exact a forfeiture of her charter; and it is not for the courts, in a collateral way, to determine the question of misuser by declaring void conveyances made in good faith. In this view of the subject we are amply sustained by the authorities. (*Baird v. Bank of Washington*, 11 Serg. & R. 418; *The Banks v. Poiteaux*, 3 Ran. 136; *Leasure v. Hillegas*, 7 Serg. & R. 319; *Angel on Corporations*, § 152; *Silver Lake Bank v. North*, 4 John. Ch. 370.)

The next question in order is, whether the city, even admitting that she can hold the lands outside of her limits for her own use and in her own right, can become a trustee of them for the benefit of others. We are now speaking of the abstract right of corporations to hold property in trust, disconnected with any consideration of the lawfulness of the trust. Whatever may have been thought in ancient times in relation to this question—although a defect of the requisites to create a good trustee, the want of confidence in the person, may then have been deemed sufficient to prevent a corporation from becoming a trustee—yet that quaint reason is

no longer respected, and the doctrine is well established at this day that a corporation may be a trustee. Chancellor Kent says it was formerly understood that a corporation could not be seized of lands to the use of another, and that it was incapable of any use or trust, and consequently that it could not convey lands by bargain and sale. But the objection that a corporation could not convey by bargain and sale was utterly rejected in the common bench, in the case of *Sir Thomas Holland v. Bonis*, as a dangerous exception to the capacity to convey; and at this day the only reasonable limitation is that a corporation can not be seized in trust for purposes foreign to its institution. Equity will now compel corporations to execute any lawful trust that may be reposed in them; and in the case of the *Trustees of Phillips' Academy v. King*, 12 Mass. 546, it was held that a corporation was capable of taking and holding property as a trustee. Many corporations are made trustees for charitable purposes, and are compelled in equity to perform their trusts. Corporations appear to be deemed competent to perform the duties of trustees, and to be proper and safe depositories of trusts. (2 Kent, 280.) As corporations no more than natural persons are compelled to accept trusts, and as they can not become trustees against their will, if the trusts, with which they are clothed and whose performance they voluntarily undertake, are not inconsistent with nor foreign to the purposes for which they were instituted, there is no reason why they should be restrained from becoming trustees. Of their fitness and capacity to manage the trust, the author of it is the sole and rightful judge; and if he is satisfied, it is not for those who have no concern in the matter to object to the trustees he may see fit to appoint. A court of chancery is vested with the same jurisdiction over corporate trusts which it ordinarily possesses and exercises over other trust estates.

We propose now to consider the question, whether the trust created by the will is such a one as the city in her corporate capacity can accept, admitting that it is of such a

character that its performance could be enforced by competent trustees. As has been observed, there is no reason why a corporation should not have capacity to undertake the execution of a trust not repugnant to the purposes for which it was instituted, and such is now the established law. This question has been confused by mingling in the argument considerations of the illegality of the trust. The matter we are now examining is whether there is any thing in the nature of the trust with which the land devised by Mullanphy is impressed, which incapacitates the City of St. Louis, in her corporate capacity, from carrying it into effect, admitting that, if the trust had been confided to competent trustees, it would have been enforced by our courts. As it is established as law that a corporation has capacity to accept a trust not repugnant to the purposes for which it was created, we do not well see how any difficulty can arise in the determination of this question. Taking it for the present as admitted that this is a legal trust, what reason can be given why the City of St. Louis should not execute it? There is no force in the argument drawn from the liability of a trust to abuse and mismanagement under the control of a corporation. It is exposed to the like dangers in the care of individual trustees. The choice of trustees is a matter of judgment, and the deviser of the trust has, in the exercise of that judgment, preferred an artificial to a natural person. Both, as trustees, are equally liable to animadversion and control of the courts.

By the charter, the mayor and city council have the power to make such rules, regulations, by-laws and ordinances for the purpose of maintaining the peace, good government and order of the City of St. Louis, and the trade, commerce and manufactures thereof, as the city council may deem expedient. What repugnance is there in the exercise of powers like these, and the management in trust of a fund "to furnish relief to poor emigrants and travelers coming to St. Louis on their way, *bona fide*, to settle in the west?" Commerce is intimately connected with emigration and draws it



within its influence. The means of transportation employed in commerce attract emigrants, and they avail themselves of those means for the purpose of emigration. The creation of a fund for the relief of poor emigrants at a great commercial point, would cause traveling to that point even by those who flattered themselves that they would never need relief. They, mindful of the vicissitudes of a long journey, and knowing that there was an asylum on the way in the event of a misfortune, would naturally prefer going among a people who had evinced so kind a regard for strangers. A charity of this character would be a benefit to the city, as it would increase the interest that would be felt for her prosperity and welfare. Many would reach the city in distress who had benefited her commerce before their arrival. Their means may have been all exhausted in paying for their transportation, which had been increased by events untoward and unforeseen.

Again, the city has power to make ordinances for her good government. To a large and commercial city emigrants will come as to a point from which, availing themselves of her facilities for transportation, they can diverge in the direction where they contemplate selecting their new homes. Good government on the part of the city would require that she should make some provision for those of that class who are in want and distress. As this is one of the consequences of her commerce, by which she is so much enriched, she must feel herself under obligation to mitigate some of the evils resulting from it. The city is also empowered to establish hospitals and make regulations for their government. A fund for the relief of poor emigrants found in the city may be made subservient to such of them as require the aid of a hospital. The fund, however it may be invested, would aid the hospital by relieving it from the necessity of retaining its inmates longer than without such fund charity would require them to be provided for. It is obvious that a trust, such as is contemplated by the will of Mullanphy, and a hospital, would reciprocally aid and assist each other.

When we regard St. Louis as a great commercial city, clothed with all the corporate powers deemed necessary for a wise administration of her municipal affairs, for her good government, and the promotion of her commerce, it is difficult to perceive how the execution of the trust of the will can conflict with the purposes for which she was incorporated. So far from it, the execution of such a trust is germane to the purposes of her charter, and will aid in the accomplishment of the great ends for which she received it. This view of the subject is not novel. It is amply sustained, as we think, by the case of *Vidal and others v. Gerard's Exec'rs*, 2 How. 127. It also harmonizes with the act of the 12th March, 1859, passed by the general assembly of this state. The act, in its preamble, recites: "Whereas doubts have been suggested as to the capacity of the City of St. Louis to take and hold property beyond the city limits, given for charitable purposes, and also as to the capacity of the city to execute charity trusts;" and it is therefore enacted "that the City of St. Louis is hereby declared to be capable of taking and holding property, real and personal, both within and without the city limits, given or to be given for charitable purposes, and of executing all such charity trusts in like manner as natural persons are." (Sess. Acts, 1859, p. 280.) Although it is not pretended that this act can operate to divest any rights vested before its passage, yet it may be regarded as a legislative declaration of opinion as to the law existing in this state in relation to the execution of trusts by corporations, and as such is entitled to the consideration of this court.

We now approach the question most argued at the bar, and which involves the extent of the jurisdiction of the courts of this state over charitable trusts. Charitable gifts and legacies have been presented to the courts distinguished by a great variety of attending circumstances. There have been charitable trusts in which the trustee was named and capable of taking the subject of the trusts, with the general purpose of the charity designated, while the objects to be ben-

effitted by it were uncertain and unknown. There have also been charitable donations, where the trustee could not take the property intended for such purpose, and where the beneficiaries of the charity were not described with certainty, leaving them to be ascertained by those who might be entrusted with its management. There have been many other charities distinguished by their peculiar circumstances, but the enumeration made will suffice, as we only propose to give an opinion as to the authority of our courts to execute the trust, the subject of this controversy, and which is embraced in one of the kinds that have been mentioned. There are courts in which it would be held that both classes just described would be enforced. But we do not deem it necessary to enter upon the consideration of that question, contenting ourselves with the determination of the only matter submitted to us. In the examination of this subject we disclaim all power to receive or reject the law of charities as we may deem most expedient for the interest of the state. For, while it may be admitted that charities are not only liable to great abuses in their creation, but also in their management, on the other hand it can not be denied that there are some which at once herald the names and fame of their founders far and wide, and dispense great blessings among those who are the objects of them. The weighing their advantages with their disadvantages is the province of the legislature; and until that branch of the government is induced to interfere, the courts must administer the law by the aid of those lights to which they resort in all other cases of doubt and uncertainty.

As there are some states in which the statute of 43 Elizabeth, respecting charitable uses, has been repealed, we do not consider that the opinions of the courts of those states, nor of other courts on the subject of the law of charities prevailing in them, should have any great influence in our judgment in relation to this matter. The case of the Trustees of the Philadelphia Baptist Association v. Smith & Robertson, 4 Whea. 1, decided in the Supreme Court of the Uni-

ted States, and Gallego's Exec'r v. Attorney Gen'l, 3 Leigh, 450, are cases which arose under the laws of Virginia; and in that state the statute 43 Elizabeth had been repealed. The case of Dashiell v. Attorney Gen'l, 5 Har. & John. 392, arose in Maryland, where the statute of Elizabeth was reported at an early day as not being in force, which report was acquiesced in as the law. If the statute of the 43 Elizabeth had been repealed in this state, we must confess we would have been embarrassed in endeavoring to uphold a charity which differed in any material respect from any other lawful trust. Although it might be argued that the repeal of the statute would not affect the common law, yet the two subjects were so closely joined, giving and receiving aid from each other, that such a measure could not fail to influence the judgment, and be regarded as evidence of the indifference if not the hostility with which the subject was viewed by the legislature. In declining to be governed by opinions formed from such considerations, we do not disparage the courts by which they were delivered, nor diminish in anywise the respect to which they are deservedly entitled.

The subject of charities is one of some importance; but as it is a matter entirely within the control of the legislature, we are relieved from the anxiety which might be felt were we conscious that our opinion was beyond the correction of the legislative power. If any evils should be apprehended from the existence of the law of charities as it is now understood, they can easily be corrected, or the cause of them be entirely removed, for the future. Our judgment can only affect the charities that have been already created, and their increase at any time may be prohibited.

Charities were not unknown to the ancient common law; and when it is observed that the common law has never prevailed where the christian religion did not exist, it is not remarkable that we should find that law a patron of charities. Hence from an early age in the history of our jurisprudence we see them, in some form or shape, so recognized in the courts that we can not be easily reconciled to the doctrine

that a trust for a charity is, like all other trusts, only to be enforced by the courts when all those circumstances concur which would authorize the execution of a trust between individuals, having no relation to any charitable use. This is doing nothing for charities, and leaves them standing as all other trusts. Swinburne says, "another privilege is, that the testament *ad pias causas* is not void for uncertainty (as other testaments are); and, therefore, if the testator say, I make the poor my executors, or, I will that my goods be distributed among the poor, such manner of appointing executors or legacies is not void."

In maintaining the proposition that the charity created by the will of Mullanphy can be enforced in our courts, we meet with no difficulty in finding cases in support of it. Our embarrassment grows out of the labor of arranging them. We are not of opinion that charities derived their existence from the statute of 43 Elizabeth. That statute was passed to provide remedies for abuses in the management of charities, and not for the purpose of giving validity to them by its own force. It referred to them as existing things, and gave an additional remedy to prevent them from being diverted from the objects for which they were created. The preamble to the act, after reciting a number of charities, declares that "they have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same." Such language is not very consistent with the idea that charities had no existence previous to its passage. Frauds and breaches of trust are terms that could not be applied to things whose existence was not recognized by law. In the case of the Incorporated Society v. Richards, Drury & Warren, 301, Edw. Sugden, Lord Chancellor of Ireland, and afterwards Lord Chancellor of England, said that the statute did no doubt give an extended power of alienation by a forced construction; but whilst it did so, one can scarcely avoid coming to the conclusion that its great object was to create a new jurisdiction, which, it was



hoped, would be more efficient in enforcing the due administration of charitable uses. He continues: "There is not a word in this act to render valid that which was invalid, or that legal which theretofore had been illegal, but much to enforce against those guilty of breaches of trust, that which was treated as perfectly legal and binding at the time the act of Parliament passed. If, then, I had to decide upon the law of England at that time, I could not hold that gifts to charities were illegal. It seems to me that this act of 43 Elizabeth proves that such gifts were binding, legal dispositions at the time it was passed, although it was necessary to employ more searching remedies and a new machinery to protect and enforce them against breaches of trust, fraud and negligence." In the case of the Attorney General v. The Mayor of Dublin, 1 Bligh, N. S. 347, Lord Redesdale (Sir John Mitford) said, "we are referred to the statute of Elizabeth in respect to charitable uses as creating a new law upon that subject. That statute only created a new jurisdiction; it created no new law; it created a new and ancillary jurisdiction, a jurisdiction borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of a court of chancery to inquire whether funds given for charitable purposes had or had not been misapplied, and to see to their proper application."

In order to appreciate the force of these opinions, it must be observed that they arose in Ireland, where the common law prevailed, but where the statute of 43 Elizabeth was never introduced. So they are entitled to great weight in the consideration of the question before us, not only as being the judgments of two of the most eminent of the English judges, but from the great similarity of the circumstances under which the question is presented here and in those cases. In England this question can not directly arise since the passage of the act of Elizabeth, though it has sometimes been discussed when it was incidentally involved in determining whether a charity should be controlled by the inherent powers of a court of chancery or under a sign manual of the



king. Our statute of the 19th of January, 1816, introduced "the common law of England, which is of a general nature, and all statutes made by the British Parliament in aid of, or to supply the defects of, the said common law, made prior to the 4th year of James the I, and of a general nature and not local to that kingdom." If the common law was aided by statutes not of a general nature but local to that kingdom, we see no reason why that law, as it existed there unaided by such statutes, should not be in force among us, as we have the means to execute it which were provided by the common law. The statute will certainly bear this construction. There is nothing in it which intimates that, where the common law was aided by a local statute that it should not be enforced here, although it can be done without the aid of the local statute.

Of late years the subject of charities has undergone a great deal of investigation, both in England and the United States; and the result of that investigation has strengthened the opinion that the law of charities did not derive its existence from the statute of 43 Elizabeth, and that there was an inherent jurisdiction in the court of chancery over the subject of charities before the enactment of that statute. The opinion of the Supreme Court of the United States, in the case of the Philadelphia Baptist Association, in which a contrary doctrine was intimated, has not given satisfaction; and in subsequent cases, occurring in the state courts, it has not been followed. Judge Story, speaking of that case in the subsequent one of *Vidal and others v. Girard's Exec'rs*, 2 How. 196, says: "Very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a curious and very interesting collection of the chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before

us. They establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for indefinite and general charities as well as for specific charities, were familiarly known to, acted upon, and enforced in the court of chancery." Whatever doubt, therefore, might be properly entertained on the subject when the case of the Trustees of the Philadelphia Baptist Association v. the Exec'rs of Hart, 4 Whea. 1, was before the court, (1819,) these doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

In the case of Zimmerman v. Anders, 6 Watts & Serg. 219, in the supreme court of Pennsylvania, it was said: "Although the statute of 43 Elizabeth is not in force in this state, it would seem that it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding than in reference to its conservative provisions. These, I conceive, have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses, which chancery supported before that statute and beyond it. Of such recognition of parts of a statute, though the statute itself be not in force, we are not without other examples." In the case of Burr's Exec'rs v. Smith and others, 7 Verm. 291, Chancellor Williams, in an opinion in which the law of charities is ably reviewed, observed that, from the examination he had been enabled to bestow on the subject, it appeared to him "that the law of charitable uses is not founded on any statute, but that it existed at common law, the elements of which were derived from the civil law, and the principles of it may be found both in the statutes and in the adjudicated cases long before the reign of Elizabeth." Chancellor Kent (2 Kent, 287) thus expresses himself in relation to this subject: "The elements of the doctrine of the English chancery in relation to charitable uses are to be found in the civil law, and it is questionable whether the English system of charities is to be referred exclusively to the statute of Elizabeth.

The statute has been resorted to as a guide, because it furnished the largest enumeration of just and meritorious charitable uses; and it may perhaps be rather considered as a declaratory law, or specification of previously recognized charities, than as creating, as some cases have intimated, the objects of chancery jurisdiction over charities. If the whole jurisdiction of equity over charitable uses and devises was grounded on the statute of Elizabeth, then we are driven to the conclusion that as the statute has never been reenacted, our courts of equity in this country are cut off from a large field of jurisdiction over some of the most interesting and meritorious trusts that can possibly be created and confided to the integrity of men. It would appear from the preamble to the statute of Elizabeth that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for the breaches of those trusts."

The foregoing citation of authorities, as to the views of the English and American judges in regard to the state of the law of charities before the statute of 43 Elizabeth, must suffice. The list might be greatly increased. In most of the states of the Union where the subject of charities has been discussed, they have been sustained, with some modifications of the law as it was administered in England, and that, too, since the case of the Philadelphia Baptist Association, in which it was thought that, independently of the statute of Elizabeth, trusts for charities were subject to the rules which govern all other trusts.

It is objected to this charity that it is contrary to sound policy; that it would be the means of attracting from abroad those who had no purpose of emigrating, merely for the sake of obtaining the relief to be furnished by the fund; and thus would fill the city with paupers and vagabonds. It will not be denied that the will creates a charity. It would be an act of charity this day to furnish relief to poor emigrants and travelers in St. Louis on their way, *bona fide*, to settle in the west. If the charity is carried out according to the

will of its founder, no injury to the community in this respect can result from its establishment. The objection seems to have its support in the idea that there will be a want of capacity in the trustees to ascertain who will be entitled to the benefit of the charity. If the first proclamation of the fact that there is a fund to furnish relief to all poor emigrants and travelers coming to St. Louis, *bona fide*, to settle in the west should induce those not intended to be beneficiaries of the trust to apply for relief, their refusal would prevent such applications for the future; and, moreover, the class of persons intended to be benefited might be made known with such publicity that all motives to the unworthy to come to St. Louis merely for the sake of charity, without any ulterior design of settling in the west, would be removed. We can not be persuaded that it is a valid objection to a charity, that from a possible abuse in its administration an injury might result to the interests of the society in which it is located. Such an objection would prove fatal to the existence of most charities. Moreover, the trustees in the management of the trust would be subject to the control of the courts, and for a wilful violation of their duty they might, like all other trustees, be displaced.

The only remaining question to be considered is whether the trust of this will can be enforced on account of the uncertainty of those who are to be benefited by it. The case, as we view it, shows that there is a valid devise to a trustee capable of taking the subject of the devise and competent to undertake and execute the trust with which the devise is clothed. As the general object of the charity was specific and certain, and not contrary to any positive rule of law, with a competent trustee to execute the charity designated, we do not see on what ground this objection can rest. If, under such circumstances, the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained. If all the recipients of a charity could be designated with certainty at the time of its creation, there would be no necessity for a law for chari-

table uses different from that which governs all other trusts. The only difficulty in the way would be the law against perpetuities, and that would not exist where the donation in trust was made to a corporation. From the very nature of the subject, charitable gifts must be objects vague and uncertain. The subjects of the charity may be numerous, and they are to be sought for and ascertained by those to whose discretion and judgment the dispensation of the relief is entrusted. The founder of a charity, by placing his fund in the hand of a competent trustee, designating the general object of the trust, with power to carry that object into effect, makes the trustee his substitute or delegate. Can not any individual, who has the means, employ them for the relief of "poor emigrants and travelers coming to St. Louis on their way to settle in the west?" If he can carry out this charity himself, may he not appoint another to do it for him? Could it be objected to such a course that the trustee would not know how to act? As the donor of the bounty is willing to confide its management to the discretion of his agent, so long as that agent acts in good faith his acts are the acts of his principal, and there is no one but the principal to complain. If the agent abuses his trust, he, like all other fiduciary agents, is subject to the control of the courts.

But the answer to the objection of uncertainty is, that by the law, as it stood unaffected by the statute, courts of equity, by virtue of their inherent powers, would execute such trusts and carry them into effect. In the case of *Mogridge v. Thackwell*, 7 Ves. 86, it was held by Lord Eldon that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. This language Story adopts in relation to this subject both in his *Equity Jurisprudence*, (§ 1190,) and in his *Appendix on Trusts* to 4 Wheat. 20. It is somewhat vague; and unless the facts of the case in which it was employed are known it may mislead. Certainly that



case carried the doctrine of charities to a great extent; and well may the chancellor have doubted and showed reluctance in acquiescing in it. These are the material facts: A testatrix gave "all the rest and residue of her personal estate unto James Vaston, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters." The residue of the personal estate amounted to £50,000. Vaston died before the testatrix, and the question was whether the disposition of the residue devolved on the crown as the general guardian of all charities; or whether, in the event that had happened, there was a lapse for the next of kin. The case was decided on a rehearing of the original decree of Lord Thurlow, who held that the residue of the personal estate passed by the will and ought to be applied in charity, regard being had to poor clergymen with large families and good characters, according to the recommendation of the will. The trust was executed by the court through a scheme approved by the Master, who had authority to receive proposals from the parties for that purpose. The decree of Lord Thurlow was confirmed by Lord Eldon. The facts of this case explain the language used by the chancellor and show how far the doctrine of the powers of the court as a court of chancery was carried. It shows what is meant by the phrase "with general or some objects pointed out." The objects pointed out were the poor clergy, but the will did not contemplate that the poor clergy should have all the residue, and as the legatee of the charity had died before the testatrix there was no person to designate the charities to which the residue should be applied. It was not supposed that if Vaston had lived the execution of the trust would not have devolved on him. His death produced all the difficulty in the case. We have been thus particular in stating the facts because they serve to explain the obscure language used by the books in speaking of the inherent jurisdiction of courts of chancery on the subject of charities, and also show that the charity with



which we are dealing, in its circumstances, falls within the class of those where there is a trustee appointed and "the general object of the charity was specific and certain," according to some, (2 Kent, 287,) or where "a charity is definite in its objects and is to be executed and regulated by trustees," according to others. (Story, § 1191.) Of this latter class, Story says: "Whether the trustees are private individuals or a corporation, the administration properly belongs to such trustees; and the king, as *parens patriæ*, has no general authority to regulate or control the administration of the funds. In all such cases, however, if there be any misuse or abuse of the funds by the trustees, the court of chancery will interpose at the instance of the attorney general, or the parties in interest, to correct such misuse or abuse of the funds. But, in such cases, the interposition of the court is properly referable to its general jurisdiction as a court of equity to prevent abuse of a trust, and not to any original right to direct the management of a charity, or the conduct of the trustees. Indeed, if the trustees of a charity should grossly abuse their trust, a court of equity may go the length of taking it away from them, and commit the administration of the charity to other hands. But this is more than the court will do, in proper cases, for any gross abuse of other trusts."

In coming to the conclusion that this charity should be carried into execution by our courts, we are sustained by the case of *Vidal et al. v. Girard's Exec'rs*, 2 How. —; and we can not but incline to the opinion that, as this case is viewed by us, there is a great similarity between them.

It can not have escaped the attention of one who has looked into the cases involving the law of charities as it has been administered both here and in England, that a great diversity of opinion exists in relation to it. Whilst most of the American courts maintain that charities existed at common law independently of the statute of Elizabeth, they have expressed their unwillingness to carry it to the length to which the court of chancery in England has done in order

to uphold charitable donations. This is the first case that has occurred in our courts, and we shall not attempt to define the extent of their jurisdiction in this branch of the law, or to point out the particulars in which it varies from the law as it is administered in England. This can not be done at once. But the subject must be left to be gradually developed as cases may arise.

After a long and laborious examination of this case, we feel ourselves constrained to carry into effect the will of the founder of this charity. To turn from the beaten track on this subject and follow cases decided under influences which do not exist here, would be to depart from the course pursued in the administration of the law in other cases. Because the subject is new to us, and never before has undergone an examination in our courts, we are not the less bound to ascertain and declare the law as we find it, discarding all pretensions to a discretionary power to admit or reject the law of charities by reason of any diversity of opinion that may be entertained in regard to the existence of such a law, or any portions of it.

Judgment affirmed; the other judges concur.



CITY OF ST. LOUIS, Plaintiff in Error, v. GORMAN, Defendant in Error.\*

1. Where the officers of a municipal corporation, without authority, assess against a person for taxation land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for nonpayment of taxes, buy the same at the tax sale and convey the same upon redemption, the corporation will not be estopped, by these acts of her officers and agents, to claim the property as her own.
2. The adverse possession of a disseizor, or of one who enters without right and retains possession by wrong, can not extend beyond the limits of his actual occupancy.

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\* The opinion of the court in this cause is also applicable to the case of City of St. Louis v. Keitley, decided at this term of the court.—[REP.]

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City of St. Louis v. Gorman.

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3. To constitute color of title some act must have been done conferring some title, good or bad, to a parcel of land of definite extent; a mere disseizor can not resort to the metes and bounds of the tract upon which he wrongfully enters.
4. If a person die in adverse possession of a tract of land and his son-in-law succeed him in the possession, the relation he sustains to the deceased will constitute such privity as will entitle him to connect his possession with that of the father-in-law so as to give him the benefit of the latter's adverse possession.

*Error to St. Louis Land Court.*

This was an action in the nature of an action of ejectment to recover possession of a tract of about sixty acres of land lying within the survey of the common of the city of St. Louis. The land sued for embraces that portion (except a small parcel sued for in the case of *St. Louis v. Keitley*) of a tract of two by forty arpens lying within the commons of St. Louis. The plaintiff relied upon her commons title, and adduced in evidence various acts of the legislature of Missouri authorizing her to deal with, dispose of, and control her common; also various ordinances of the city from 1835 to 1856, showing the action of the city with respect to her commons.

The defendant introduced in evidence, against the objection of plaintiff, De Ward's map of St. Louis common, upon which the Durand claim as laid down by De Ward was marked out. The defendant also introduced in evidence, against the objection of plaintiff, various tax receipts, tax deeds, certificates of purchase and certificates of redemption, and redemption deeds. From these it appeared, among other things, that in the year 1845, and afterwards, the eastern portion of the tract in dispute—that within the city limits—was assessed for taxation against "Nicholas Durand," "Durand claim," "Durand's heirs," "James Gorman." In 1845 John Corcoran, as shown by tax receipt, paid taxes. The land was returned delinquent for taxes of 1846 and sold to John Corcoran, who received comptroller's deed. Corcoran died in 1848 leaving several children. The land

was returned delinquent for the taxes of the year 1848, was purchased by the city, and redeemed by and conveyed to James Gorman. There were various tax receipts showing payment of taxes by James Gorman since 1851 and 1852. There was no attempt to show title in or under Durand. Evidence was introduced with a view to show that James Gorman and his father-in-law, Corcoran, had had adverse possession of the land sued for for more than twenty years before suit was brought.

The court, at the instance of the defendant, gave the following instructions: "1. If the jury find from the evidence that before the year 1833 one Durand claimed the tract of two by forty arpens of which the premises in controversy are a part; that the boundaries thereof were defined, and the tract mapped out by the plaintiff upon a plat of the survey of the common of the city of St. Louis as a piece of ground claimed under Durand adversely to the city; and that this plat of survey was made as early as 1835 or 1836; that until the year 1843 the said tract was wholly without the chartered limits of the city of St. Louis; that in 1843 the charter of said city was altered so as to include within the city limits so much of said tract as lay to the east of Second Carondelet avenue; that thereupon the City of St. Louis caused to be assessed to the defendant or those under whom he claims so much of said tract as lay within the city, describing the same as the property of the defendant or those under whom he claims, and caused the taxes due on said land to be collected and paid into the city treasury; and if the jury shall further find that the possession and claim of the defendant as to the land within the city limits was of the same nature and character with his possession and claim to the remainder of the tract outside of those limits, then this is evidence, not merely of the possession and claim of defendant to the whole of the tract outside as well as inside of the city limits, but of the knowledge and acquiescence of said plaintiff in such possession and claim by the defendant. 2. Neither occupation, cultivation nor residence will be necessary to con-

stitute actual possession of a tract of land when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party seeking the protection has been evidenced and accompanied by public, unequivocal and continued acts of ownership and control such as he would naturally exercise over property which belonged to him, and would not exercise over property which did not so belong; and if the jury find in this case that the defendant and those under whom he claims have continuously and uninterruptedly exercised over the land in controversy such public, unequivocal and notorious acts of ownership and control for the space of twenty years before the commencement by the plaintiff of any legal steps to dispossess him or them, and that, during the whole of that period, the defendant and those under whom he claims have denied the title of the plaintiff and claimed the land as their own, then the plaintiff can not recover in this action. 3. The jury is instructed that to constitute an adverse possession of a tract of land there need not be an enclosure, building, or other improvements. It is enough if there be exercised over the property visible and notorious acts of ownership after an entry under claim and color of title. An entry is by color of title when it is made under a real and not a pretended claim to a title held by another. The term itself implies that the party so entering has not the true title, but the law regards him as having color of title if he claims and believes that the land in good faith belongs to him and enters into possession accordingly. If after so entering he and those claiming under him continue for twenty years in the exclusive enjoyment of the tract and in the exercise of open and notorious acts of ownership thereon, he and they are protected by adverse possession and the statute of limitation against all the world. 4. The plaintiff can not recover against the defendant any part of the land in controversy which lies east of the city's western line as it stood in 1845 and following, as the same is described in the tax receipt and deed of the city read in evidence. 5. If the jury find from

the evidence that for more than twenty years before the commencement of this suit the tract of two by forty arpens of land, of which the premises in controversy are a part, was recognized and mapped out by the plaintiff as a distinct and definite tract of land within the city commons claimed adversely ; that in 1833 or 1834 one John Corcoran, claiming to be the owner of said tract of two by forty arpens, entered upon the same and built a dwelling-house, and enclosed and cultivated a garden of several acres adjoining thereto, upon the eastern part of said tract, and occupied said house as his dwelling ; that the remainder of said tract was then mostly covered by stone quarries and not susceptible of any permanent useful improvement ; that said Corcoran, at the time of said entry, took possession of said quarries, and exercised over the remainder of the tract open, visible and notorious acts of ownership and control, excluding from every part of the tract all the persons who did not hold the same under him ; that said claim, occupation and acts of ownership and exclusive control were by said John Corcoran and those claiming under him continued for twenty years before the commencement of any legal steps by the plaintiff to dispossess the said Corcoran and those claiming under him, then they must find for the defendant."

The plaintiff suffered a nonsuit, with leave, &c.

*Glover & Richardson*, and *S. Simmons*, for plaintiff in error.

I. All the evidence introduced concerning the tax deeds and tax receipts was improperly admitted, and all the defendant's instructions grounded on these papers were erroneous. Neither of said supposed deeds was an estoppel on the plaintiff ; neither was the act a deed of the corporation. No law or ordinance authorized them. The land was confirmed to and belonged to the city. No city officer could lawfully assess city property for taxes. The assessment was void ; all the subsequent steps also were void. (8 Ohio, 187 ; 13 Louis. 205 ; 34 Maine, 89 ; 3 Mass. 419 ; 1 Bibb, 295 ; 36



Maine, 433.) Durand never had any title. No title could consequently pass to the purchaser at the tax sale. It is not attempted to be shown that the forms of law were complied with. Officers of municipal corporations are special agents, acting under special instructions contained in ordinances. Those who deal with them must take notice of these ordinances. The comptroller had no power which did not appear on the face of the ordinances. A corporation speaks or acts only in the mode prescribed by law. (2 Cranch, 167.) No corporation is bound by any unlawful act of its officers though done *colore officii*. (19 Pick. 511; 13 B. Monr. 563; 16 Shepl. 29; 3 Day, 495; 18 Mo. 227; 1 Hill, 551; 14 Verm. 311; 25 Mo. 503.) The deed to Gorman is void.

II. Corcoran entered without title or color of title. He is limited to his actual occupancy. His possession was adverse only to the extent of his actual enclosures. (Angel on Lim. 420; Adams on Eject. 582.) There is no constructive possession in favor of a trespasser. (Miller v. Shaw, 7 S. & R. 136.) The possession must be marked by definite boundaries. (Adams' Eject. 572; 10 Johns. 477; 19 Penn. 262; 10 S. & R. 303.) It must continue the same in point of locality; must not be a roving possession. Defendant can not connect a part that he has occupied for twenty years with a part that he has occupied for a less time. (27 Mo. 410, 415.) The Durand claim extended east of the commons; and conceding that his fence encroached upon the common, the city was constructively in possession of the residue of the tract. The city had actual possession of parts of the commons. (27 Mo. 410, 415; Angel on Lim. 432; 10 Mo. 769; Beesly, 461; 1 Hill., S. C. 135.) The defendant showed no privity with Corcoran. The succession must be transmitted by contract or operation of law. (27 Mo. 203; 23 Mo. 336; 5 Maryl. 257.) The court erred in giving the third instruction. The definition of color of title is incorrect. What is color of title is a matter of law. (18 How. 59.) There was no evidence authorizing the court to say there was any color of title exhibited by the defendant.

There is no evidence that the entry was made under a real claim. It does not appear that defendant or Corcoran claimed in any matter whatever under Durand, or any other person. There must be some appearance of title. (1 Cow. 285; 18 How. 56; 29 Barb. 323; 10 Barb. 256; 15 Ill. 73; 2 Smith L. C. 484.) De Ward's map was not color of title. The defendant might with as much propriety claim that the extent of his claim was bounded by the exterior lines of the survey of commons. (3 Barr, 214; Adams' Eject. 582.) That map was not made twenty years before the bringing of suit. There was nothing but a wandering, vagrant possession of a few sink-holes in different parts of the tracts for the purpose of quarrying rock. The plaintiff's instructions should have been given.

*Gantt & Gibson*, for defendant in error.

I. The instructions refused were properly refused. The instructions given for the defendant were correct. The city can not assert title in herself to land which for a long time it has caused to be assessed as the property of a private individual, for which it has collected taxes, which it has caused to be returned delinquent for the nonpayment of taxes, and for which, after purchasing it at tax sale, it has executed a deed according to ordinance to the claimant or person to whom it was so assessed. These acts constitute an estoppel *in pais*.

II. The instructions given by the court on the subject of the statute of limitations and adverse possession furnish a correct declaration of the law on that head.

Scott, Judge, delivered the opinion of the court.

The city being the owner of the land assessed and sold for taxes to the defendant through the instrumentality of her officers, it is maintained by him that she is estopped to deny the regularity of the proceedings by which he claims title.

The city is a body corporate, clothed with extensive powers for the management of her municipal affairs. She can only

act through her officers and agents ; and if those officers, in violation of her ordinances, do unauthorized acts to her prejudice, it would be hard that she should be bound by them. This, surely, is not the law in relation to natural persons who act through their agents. If the agent exceeds his authority, his constituent is not bound. Those dealing with agents must look to the extent of their power. Agencies are indispensable in the transaction of the business of men ; and, if those who employ them are estopped to deny the validity of the acts performed by them, commerce must be restrained within very inconvenient, if not ruinous, bounds. The State of Missouri owns a tobacco warehouse in St. Louis ; if the state officers should assess that property in the name of an individual, and sell it for the taxes, would any one maintain that she was estopped to deny the validity of a title claimed under such a sale ? The state has delegated to St. Louis the powers necessary for her municipal government, thus imposing on her an obligation that would otherwise devolve on the state. The city, in the discharge of this duty, is compelled to act by officers. Now, if the state, acting through her officers, is not bound by their unauthorized acts, we can see no reason why the city, in the exercise of functions pertaining to the state and for the performance of which she is substituted in the place of the state, should not stand, in relation to the agents she may employ, on the same ground that the state would to her officers.

We must all see the numberless frauds the sanctioning of the principle insisted on would produce. The argument confounds the city with her officers and assumes that they are the city. If an officer of the city, in violation of her ordinances, makes a contract with an individual, is the city bound by such a contract ? Must not those who contract with the officers employed by the city see that the officers, with whom they are contracting, conduct themselves in pursuance to law ? The defendant, claiming that he has obtained the title of the city to a portion of her commons through her officers, is compelled to show that these officers, in assuming to

pass a title, acted in pursuance to the ordinances prescribed for the regulation of their conduct on such occasions. This is a well established rule in regard to all those deriving title to land by means of a sale for the taxes. The bare statement of the law in relation to estoppels *in pais* is sufficient to show that it can not apply to transactions where there is the interposition of third persons as agents acting in violation of their authority. It has thus been stated: "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time." (Pickard v. Sears, 6 Adol. & Ellis, 494.) The same judge more broadly expressed the rule, on another occasion, thus: "A party, who negligently or carelessly stands by and allows another to contract on the faith and understanding of a fact which he can contradict, can not afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. (Greggs v. Wells, 10 Adol. & Ellis, 90.)

We do not see the ground on which it can be maintained that Corcoran, under whom the defendant claims, had any color of title. The evidence relied on would just as well show that he had a color of title to all the land unoccupied within the outboundary of the commons. It is not pretended that Corcoran entered under Durand, or that there was any privity in any respect between them. Because the Durand tract, as marked down on the plat, was of certain dimensions and more sizeable than the entire commons, it seems to have been deemed more politic to make it the evidence of the extent of the color of title. This is the first attempt here to make the boundaries claimed by the owner of the land evidence of color of title in an intruder. The effect of this is to do away with all the law in relation to color of title, and in every case make the boundary of the person, upon whom the trespass is committed, evidence of the extent of the claim of

the trespasser. Because the city had, by her officers, laid down the claim of Durand on the plat of the commons, there is no principle by which the defendant can claim any benefit from such act, as he does not claim under Durand nor in privity with him. In the case of *Pitts v. Gilbert*, 3 Wash. C. C. 478, Judge Washington said: "It is a clear principle of law that the right acquired by the adverse possession of a disseizor, or of one who enters or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation is confined. If he could go beyond these, there would exist no other to circumscribe his claim. He can not resort to the metes and bounds of the tract upon which he has settled, because the legal possession of the owner continues unaffected by the tortuous entry, except so far as the actual adverse possession has disturbed it."

The defendant cited a remark made by Judge Gibson in the case of *McColl v. Neely*, 3 Watts, 69, that he was "not aware that the definition of a colorable title, or, as it is expressed more frequently, color of title, had ever been attempted. The words do not necessarily import the accompaniment of the usual documentary evidence." But general expressions in an opinion must be taken with reference to the facts of the case in which they are made; and the application of this remark makes it appear that the case to which reference has been made, so far from being a decision in support of the proposition that there is a color of title in the case before us, its tendency is the other way, and it may be used to show that there is no color of title in the claim on which the defence to this action is made. Angel says that "where a deed, relied on as giving a color of title, contains no description of the land, although it is of no moment that the title is defective, yet if no land is described nothing can pass, and therefore such a deed can not be the foundation of an available adverse possession beyond the actual improvement." (Angel on Lim. 440.) When we say a person has color of title, whatever may be the meaning of the phrase, we express the idea, at least, that some act has been previously done, or

some event transpired by which some title, good or bad, to a parcel of land of definite extent has been conveyed to him. Can the marking of the claim of a stranger upon the plat of his land by the owner confer a color of title on one who has [no] privity in estate, in contract or in law, with the title of the stranger?

Cases without number might be cited in support of the doctrine that the right acquired by the adverse possession of a disseizor, or of one who enters or retains possession by wrong, can never extend beyond the limits of the actual occupancy. There is one in which this subject is very ably treated, and the law so luminously stated by the judges that it should alone suffice. The case to which reference is made is that of *Muller and others v. Shaw*, 7 Serg. & Rawle, 129. To the same purpose might be cited the case of *Barr v. Gratz*, 4 Whea. 224.

As we maintain that *Corcoran*, under whom the defendant claims, had no color of title, we do not deem it necessary to determine the question whether the possession of a part of her common by the city, in the manner stated in the record, excluded any constructive possession of the defendant, as, he having no color of title, his possession could not extend beyond the limits of his actual occupation.

On the general question of adverse possession, as the case now stands on a nonsuit, and as the jury has never passed upon the evidence in relation to that matter, it is not the usual course here, under such a state of things, to express an opinion upon the facts. We suppose the plaintiff took a nonsuit in consequence of the instruction in relation to the effect of a sale for taxes by the city officers. Although this instruction only affected a part of the land in the controversy, it was sufficient to warrant such a course, as otherwise the plaintiff must have had a verdict against her for so much of the lot as was affected by the instruction. The case of *Ewing v. Burnett*, 11 Pet. 41, and *Draper v. Shoot*, 25 Mo. 197, relied upon by the defendant, were very different in their circumstances from that now before us. By taking the law of



limitations, as applied to one state of facts, and endeavoring to apply it to a condition of things wholly different, we will never arrive at its correct administration. Surely a man, who has no title nor even color of title to land, who knows that he is wrongfully endeavoring to obtain it by adverse possession, should give to the world the most unequivocal evidence of his intention. It will be for the jury to determine with what intent the stone quarries were worked, and whether the evidence of the adverse possession of the defendant may not be reconciled with the declaration of the plaintiff's witness, that Corcoran told him that he claimed no part of the commons of the city.

We do not see the point of the defendant's first instruction. From the view we take of this case the defendant's instructions were erroneous.

If Corcoran died in possession, his possession would descend on his children; and if the defendant had married one of them, that marriage would constitute such a privity as would entitle him to connect his possession with that of his wife's father, so as to give him the benefit of the adverse possession of the father.

The judgment is reversed and the case remanded. The other judges concur.

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3. A grant of administration by a county court is a judicial act, and as such must be conclusive on all other courts until it is revoked; the validity of such grant can not be attacked collaterally. *Id.*
4. An administrator duly appointed by a county court of this state is entitled to the possession of the personal property of the deceased found here, and his right to sue for such possession is exclusive of the foreign executor, distributees, and all others. *Id.*
5. One S. died in Kentucky in 1826. No administration in form was had upon his estate, but his widow and heirs made a division of his property, and a certain female slave named Milly was, with other property, assigned to the widow. About ten years after the death of her said husband the widow removed to the state of Missouri, bringing with her said slave Milly and her children. She died in 1855, and by her will disposed of said Milly and her children. Letters of administration were afterwards taken out upon the estate of S. *Held*, that the administrators of S. were proper parties plaintiff in a suit brought for the possession of said slaves in behalf of the representatives of said S. *Salmon's Adm'rs v. Davis*, 176.
6. After an administrator has appeared in a probate court and put in a defence to the allowance of a demand against the estate of his intestate, and has obtained judgment in the probate court, and the cause has been taken to the circuit court by appeal, it is too late for the administrator

## ADMINISTRATION—(Continued.)

to object that he did not receive a notice of the demand as provided by section sixteen of article four of the administration act. (R. C. 1855, p. 155.) *Kincheloe v. Gorman's Adm'rs*, 421.

7. The affidavit required by the twelfth section of article four of the administration act (R. C. 1855, p. 154) may be made *ore tenus*; it is not necessarily noted on the record. *Id.*
8. Judgments obtained in a sister state are not entitled, under our administration act, to be classed in the fourth class of claims against the estates of decedents; they are entitled to no preference over any other debts. *Gainey v. Sexton's Adm'r*, 449.

## AGREEMENT.

See BANKING. VENDORS AND PURCHASERS. CONVEYANCE. FRAUD AND FRAUDULENT CONVEYANCES.

1. A subscriber to the stock of a plank road association, organized under the act of February 27, 1851, (Sess. Acts, 1851, p. 259,) made his subscription upon the faith of an agreement made with a previous subscriber and stockholder that he would not be required to pay his subscription unless the road should be built; *held*, that this agreement was void. *Lagrange & Monticello Plank Road Co. v. Mays*, 65.
2. A. executed in favor of B. the following agreement: "I hereby obligate myself to insure to B. ten per cent. per annum profit upon the amount of capital invested by him in the trade of merchandise to be managed by me at Louisiana, Mo. March 18, 1846. [Signed] A." C. endorsed this agreement as security for A. B. invested money upon the faith of this agreement and endorsement. *Held*, that the liability of A. and C. was contingent and conditioned upon the profits accruing falling below ten per cent. upon the amount invested by B. *McPike v. Kerr's Exec'r*, 79.
3. Where a party sues on a special contract to recover compensation due on its performance, he must show performance thereof on his part, or a legal excuse for nonperformance. *Marsh v. Richards*, 99.
4. Where a contractor engages to furnish materials and perform certain work for another—as to construct the brick work of buildings—and he does perform the contract, but not in the manner or with the materials required, he may, notwithstanding, if the party for whom the work is done receive and enjoy the same, recover compensation therefor. *Id.*
5. The value of the work as actually done proportionally to the price fixed in the contract is the measure of damages in such case. *Id.*
6. Where a contractor engages to construct buildings with pressed brick fronts, and he uses a brick of inferior quality, the relative cost of pressed brick and the kind of brick used is a proper matter to be considered by the jury in ascertaining the compensation to be allowed the contractor. *Id.*
7. Where a contract is reduced to writing, the written instrument is presumed to contain the whole contract; parol evidence is inadmissible to contradict or vary its terms. *Peers v. Davis' Adm'rs*, 184.
8. Where a person subscribes to the stock of a railroad company upon

## AGREEMENT—(Continued.)

- condition that the road should "pass" through a certain county, and on a certain designated route, it is not a condition precedent to the right of the company to demand the amount subscribed that it should actually construct and complete the road along the line designated; it is sufficient if the road be thus permanently located. *North Missouri Railroad Co. v. Winkler*, 318.
9. To constitute an agreement there must be the assent of the promisee; a mere promise on one side only is not sufficient; there must be mutuality of obligation. *Brown v. Rice*, 322.
  10. A promise, to support an action, must be founded on a sufficient consideration. *Bailey v. Walker*, 407.
  11. A. agreed with B. that if the latter would proceed with his team to a place at a distance he would furnish him with 3,000 pounds of "back loading" from that place; B. did go with his team to the designated place and A. furnished him with only a portion of the freight agreed upon. Held, that B. was entitled to recover for the whole amount agreed upon. *Burrow v. Pound*, 435.
  12. Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, he may recover the sum agreed upon, including the percentage, of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company. *Blair v. Corby*, 480.

## AMENDMENTS.

See PLEADING.

## APPEAL.

See BOONVILLE. WRIT OF PROHIBITION.

1. An appeal will not lie under the general law of this state by a county from a judgment of a county court allowing an account against the same. *Whitehead v. Stoddard County*, 138.
2. This rule applies to the district county court organized under the act of March 1, 1855, (Sess. Acts, 1855, p. 474,) for the counties of Stoddard, Dunklin and Butler. *Id.*

## ARBITRATIONS.

1. It is not essential to an arbitration that it should adjust all matters in difference between the parties; an award determining a single one of several matters in difference may be final and conclusive so far as it goes. *Pearce v. McIntyre*, 433.

## ASSIGNMENTS.

See FRAUDS AND FRAUDULENT CONVEYANCES.

1. There is nothing in the act concerning voluntary assignments, (R. C. 1855, p. 202,) which authorizes the circuit court, on a motion of a

ASSIGNMENTS—(*Continued.*)

creditor, to direct the assignee to let in such creditor and allow him to prove up his demands against the assigned effects. *January v. Powell & Co.'s Assignee*, 241.

2. If the assignee improperly refuse to allow the creditor to prove his claim, the proper remedy for the creditor to resort to is a writ of mandamus. *Id.*

## ATTACHMENT.

1. A foreign corporation, which has its chief office or place of business within this state, can not be sued by attachment upon the ground of nonresidence; the liability of such corporations to attachment under the attachment act of 1855 (R. C. 1855, p. 238) is limited to the cases where they have their chief office or place of business out of this state. *Farnsworth v. Terre-Haute, Alton & St. Louis Railroad Co.*, 75.
2. A foreign corporation having its chief office or place of business in this state may, it seems, be sued, as if resident here, by ordinary writ of summons. *Id.*
3. If the bond filed by a plaintiff in an attachment suit be insufficient, he has a right to file another. (R. C. 1855, p. 242, § 9.) *Beardslee v. Morgan*, 471.

## ATTORNEY AT LAW.

1. An attorney at law is a competent witness in a cause in which he is engaged as attorney; he may testify as to privileged communications made to him by his client, if they are otherwise relevant, when called upon by his client so to do. *Riddles v. Aiken*, 453.

## ATTORNEY'S FEES.

See PARTITION, 1, 2.

## B

## BAILMENT.

See COMMON CARRIER.

1. A watchmaker who receives a watch to repair is bound to use ordinary diligence in its safe-keeping; if the watch while in his custody be stolen through his negligence he will be liable. A demand for the watch by the bailor would not in such case be necessary to entitle him to sue. *Halyard v. Dichelman*, 459.
2. An innkeeper has a lien upon the goods of guests only, not upon the goods of persons boarding with such innkeeper under a special contract. *Hursh v. Byers*, 469.

## BANKING.

1. If a corporation to which the act to prevent illegal banking (R. C. 1855, p. 286) is applicable violate the same by receiving and passing bank notes of less denomination than five dollars, this violation may be pleaded in bar of any suit instituted by such corporation. (R. C. 1855, p. 288, § 9.) *Christian University v. Jordan*, 68.

## BANKING—(Continued.)

2. To render a corporation responsible for the acts of its agent, a treasurer, in illegally receiving or passing bank notes of less denomination than five dollars, it is not necessary that the agent should have express authority from the corporation. *Id.*

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

See LIMITATION, 2. EVIDENCE, 30.

1. Where a promissory note is made to an administrator in his representative character, and such administrator dies, a suit thereon may be properly brought in the name of the executor of such administrator. *Cook's Exec'r v. Holmes*, 61.
2. No endorsement or written assignment of a promissory note is necessary to enable the holder thereof to maintain an action thereon in his own name. *Lewis v. Bowen's Adm'r*, 202.
3. What is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are admitted; where the facts are disputed, the court should give hypothetical instructions, leaving the facts to be determined by the jury. *Linville v. Welch*, 203.
4. If the residence of the endorser of a dishonored bill of exchange is unknown to the holder, inquiry should be made to ascertain his domicile or place of business. *Id.*
5. A bill of exchange drawn in one state of the United States upon a person in another state is to be treated as a foreign bill of exchange; in case of dishonor, protest is necessary; it is not necessary, however, that the notice of dishonor should be accompanied by a copy of the protest. The notice may be a verbal one. *Id.*
6. Presentment of a bill of exchange to the drawee must be made in a reasonable time. What time will be reasonable depends upon the circumstances of the case. *Id.*
7. In a suit upon a promissory note absolute on its face, parol evidence is inadmissible to show that, though absolute in form, it was payable only upon a contingency, or that in a certain event only one-half the amount was to be paid. *Smith's Adm'rs v. Thomas*, 307.
8. In the execution of a promissory note a person may adopt and ratify the signing of his name by another. *Dow's Exec'r v. Spinney's Executor*, 386.
9. Where a promissory note is given to a guardian of an insane person as guardian, he may institute suit upon it in his own name. *Wickerson v. Gilliam*, 456.

## BOATS AND VESSELS.

See COMMON CARRIER.

## BOND.

See PARTNERSHIP, 5, 6. REVENUE.

## BOONVILLE, CITY OF.

1. In cases arising under the ordinances of the city of Boonville in which the fines assessed do not exceed the sum of five dollars, the decision of



BOONVILLE, CITY OF—(*Continued.*)

the mayor is final; it can not be reviewed on appeal or *certiorari*; nor can a writ of prohibition be resorted to to restrain the collection of the fine. *Wertheimer v. Boonville*, 254.

## BUTLER COUNTY.

See COUNTY COURTS.

## C

## CARONDELET COMMON.

See LANDS AND LAND TITLES.

## CERTIORARI.

See BOONVILLE.

## CHARITIES.

1. The City of St. Louis, under its charter and the general law concerning corporations, has power to acquire and hold such land beyond the limits of the city as may be necessary for the purposes of the corporation; the right of the city to hold land beyond the city limits is not restricted to the specific purposes mentioned in the second section of the first article of the charter of St. Louis of March 3, 1851. *Chambers v. City of St. Louis*, 543.
2. The question whether a municipal corporation, authorized to purchase and hold real estate for certain purposes, transcends the exact limits of its power, and acquires land that it is not authorized to hold for any of the purposes of the corporation, can only be raised and determined in a proceeding instituted at the instance of the state. *Id.*
3. Municipal corporations may hold property in trust for charitable uses; they may be compelled in equity to administer and execute the trusts imposed upon them. *Id.*
4. The statute of 43 Elizabeth concerning charitable uses is, it seems, in force in this state. *Id.*
5. Gifts to charitable uses were valid and binding dispositions previous to the passage of the statute 43 Elizabeth, ch. 4; the law of charities did not derive its existence from said statute. The jurisdiction of courts of equity over charitable uses and devises is not grounded, in this state, upon said statute, but upon the common law. *Id.*
6. In the year 1849 one Bryan Mullanphy made his last will in the following words: "I, Bryan Mullanphy, do make and declare the following to be my last will and testament: *One equal undivided third of all my property, real, personal and mixed, I leave to the City of St. Louis, in the state of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the west.* I do appoint Felix Costé and Peter G. Camden executors of this, my last will and testament, and of any other will or executory devise that I may leave. All and any such document will be found to be olograph, all in my own handwriting. In testimony whereof witness my hand and seal. [Signed] Bryan Mullanphy (seal)."

CHARITIES—(*Continued.*)

The testator died in 1851, leaving a large estate, valued at more than a million and a half of dollars, the greater part of which consisted of lands situate in St. Louis county, beyond the limits of the city. The will was duly admitted to probate. *Held*, that the devise was a good and valid devise; that the City of St. Louis was capacitated to take and hold all the property embraced within the terms of the will upon the trusts therein indicated, and to execute and administer said trusts, subject to the control of a court of equity. *Id.*

## CITY OF ST. LOUIS.

See CHARITIES.

## CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gives a return bond and receives the property sued for, and fails to prosecute the action with effect, an assessment of the value of the property and of damages for its detention may be made and judgment against the plaintiff rendered, as directed in sections eight and nine of the replevin act of 1845. Summary statutory proceedings may also be had under section nine of the eighth article of the practice act of 1849. The party may also, after the final determination of the suit, resort to his common law action on the return bond, and may recover full damages within the limit of the penalty, although no judgment may have been rendered for the return of the property or for damages. *Hansard v. Reed*, 472.
2. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gave a return bond and received the property sued for, and the court sustained a demurrer to the petition, and gave judgment for costs against the plaintiff, no assessment of the value of the property or of damages for its detention being made, nor a return of the property awarded, and afterwards the court at the same term granted the plaintiff leave to amend his petition; *held*, that the grant of leave to amend impliedly set aside the judgment for costs against plaintiff and reinstated the cause; and that the cause being still undetermined it would be premature for the defendant to institute a suit on the return bond. *Id.*

## CLERK OF ST. LOUIS CRIMINAL COURT.

See FEES.

## COMMON CARRIER.

1. In an action against a steamboat in which it is sought to hold the steamboat responsible as a common carrier, it is not necessary that the petition should expressly state that the steamboat is a common carrier; it is sufficient if it clearly appear from the whole petition that the contract of affreightment, the breach of which is complained of, was entered into with her in that capacity. *Smithers v. Steamboat War Eagle*, 312.

## CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USES.

1. Where land is condemned in behalf of a railroad company, the validity of such condemnation can not be called in question in a collateral proceeding. *Evans v. Haefner*, 141.
2. In proceedings instituted by a railroad company to obtain the condemnation of private property, the court, on confirming the report of the commissioners, ordered the plaintiff to deposit the compensation assessed forthwith with the clerk of the court to the credit and on account of the defendant. The clerk tendered the money to the attorney of the defendant and he refused to receive it. *Held*, that the company was justified in entering upon and taking possession of the land condemned. *Id.*
3. Where land is condemned in behalf of a railroad company, the decree of condemnation, it seems, vests in the company the title to the earth and minerals found above the grade of the road, and whose excavation is necessary for the construction of the road; minerals lying below the level of the road, and whose excavation is not necessary in the construction of the road, belong to the owner of the land condemned. *Id.*
4. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph Railroad Company, under its charter, to obtain a condemnation of land, the report of a set of commissioners or viewers is set aside, the judge in ordering a review must appoint a new set of viewers. (Sess. Acts, 1857, p. 250, § 9.) *Hannibal & St. Joseph Railroad Co. v. Rowland*, 337.
5. Where the judge, upon the making of the report of the viewers, sets the same aside on the ground that the damages had not been estimated in the mode required by the law, the award of damages being conditional, and sends back the same viewers with instructions as to the rule in assessing damages, this would not be a review within the meaning of the charter, and would not require the appointment of a new set of viewers, nor would it come within that provision of the charter that provides that "not more than one review shall be granted to the same person." *Id.*

## CONFIRMATIONS.

See LANDS AND LAND TITLES.

## CONSTABLE.

See SCHOOLS.

1. A constable who levies upon and sells property under an execution not directed to him and illegally in his hands, may be treated as a mere trespasser; the constable must derive his authority from the justice who rendered the judgment or his successor in office. *Barley v. Tipton*, 206.
2. The officer receiving an execution from a justice of the peace should endorse thereon the time of its receipt. The docket of the justice can not be received in evidence to show the date of the receipt of the execution by the constable. *Gott v. Williams*, 461.

## CONSTITUTIONAL LAW.

See CRIMES AND PUNISHMENTS, 9. CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USES. JUDGMENTS OF SISTER STATES.

1. The pardoning power granted by the constitution to the governor of this state extends to the granting of pardons as well before as after conviction. *State v. Woolery*, 300.
2. The general assembly has power under the constitution to create municipal corporations and to confer upon them the authority to pass police regulations and to punish persons for their violation. *State v. Cowan*, 330. *State v. Hambleton*, 336. *State v. Tilton*, 336.
3. If a municipal corporation created by the law of this state should take cognizance of an act made an offence by its ordinances and punish it, the person thus punished can not be subjected again, under the general law of the state, to punishment for the same act or offence. *Id.*
4. The general assembly has power under the constitution to enact that, for offences of the grade of misdemeanors, persons may be proceeded against criminally either by indictment or by information. *Id.*
5. Although by the general law of the state persons charged with certain offences of the grade of misdemeanors must be proceeded against criminally by indictment, yet the general assembly may grant to municipal corporations the power to ordain that persons charged with such offences may be proceeded against criminally by information. The general state law and the municipal ordinance may have a concurrent operation. *Id.*

## CONSTRUCTION.

See WILLS. AGREEMENT. CONVEYANCES. FRAUD AND FRAUDULENT CONVEYANCES.

## CONTRACT.

See AGREEMENT.

## CONVEYANCES.

See AGREEMENT. FRAUD AND FRAUDULENT CONVEYANCES. WILLS AND TESTAMENTS.

1. Drunkenness does not render a deed made under its influence absolutely void, but only voidable; so long as the grantor in the deed acquiesces in it, it can not be impeached by third persons on the ground that it was executed by him when drunk. *Eaton's Adm'r v. Perry*, 96.
2. A., being the owner of two sections of land, by instrument dated in 1836 and recorded in 1837, sold and agreed to convey to B. an undivided one-fourth part thereof. The interest thus acquired passed to and became vested in C. by deed dated April 29, 1842, but not recorded until December 20, 1847. A., by deed dated in 1839 and recorded in 1841, conveyed said two sections to D. and E. subject to the rights of B.'s representatives under the above agreement. Under this deed to D. and E., C. became interested to the extent of an undivided fourth part of the interest thus acquired by said D. and E. In 1844, under an execution issued against C., the sheriff levied upon "all the right, title, interest and estate of the said C. in and to" the several tracts

CONVEYANCES—(*Continued.*)

- embraced in the deed from A. to D. and E., together with other tracts. In the levy and advertisement the tracts described in the deed from A. to D. and E. are designated by the numbers of the sections, township and range, after which there follows this further description: "Being the same property conveyed by A. to D. and E. by deed dated 28th of June, 1839, and recorded in book O, p. 351 and 352." The deed of the sheriff adopts the descriptions contained in the levy and advertisement, and conveys to the purchaser "all the right, title, interest and claim" of C. in and to said tracts so described. *Held*, that the purchaser, by this sheriff's deed, acquired title to that interest only which was vested in C. under the deed from A. to D. and E., and not to that held by him, at the date of the levy and sale, under the title acquired by B. from A. *Parks v. Watson*, 108.
3. Where a deed of a married woman is invalid by reason of a defective acknowledgment, she may ratify and confirm the same after becoming discoverer; a mere parol adoption would not be sufficient; it would be within the statute of frauds. *Price v. Hart*, 171.
  4. Where an administrator's deed conveying lands refers to the report of sales made by the administrator to the county court, such report, together with a plat of lots sold accompanying it, will be regarded as incorporated with the deed for purposes of construction and interpretation; they will be admissible in evidence to determine the boundaries of the land conveyed by the administrator's deed. *Orrick v. Bowser*, 210.
  5. A call for quantity in a deed must yield to a more definite description by metes and bounds. *Id.*
  6. Where a person, owning a tract of land containing, say twelve hundred acres, conveys five hundred acres thereof, not designating the land conveyed by metes and bounds, the purchaser will hold an undivided interest in the whole proportional to the number of acres conveyed to him. *Pipkin v. Allen*, 229.

## CORPORATIONS.

See AGREEMENT, 1, 8. CONSTITUTIONAL LAW. CHARITIES.

1. If a corporation to which the act to prevent illegal banking (R. C. 1855, p. 286) is applicable violate the same by receiving and passing bank notes of less denomination than five dollars, this violation may be pleaded in bar of any suit instituted by such corporation. (R. C. 1855, p. 288, § 9.) *Christian University v. Jordan*, 68.
2. To render a corporation responsible for the acts of its agent, a treasurer, in illegally receiving or passing bank notes of less denomination than five dollars, it is not necessary that the agent should have express authority from the corporation. *Id.*
3. A foreign corporation, which has its chief office or place of business within this state, can not be sued by attachment upon the ground of nonresidence; the liability of such corporations to attachment under the attachment act of 1855 (R. C. 1855, p. 238) is limited to the cases where they have their chief office or place of business out of the state. *Farnsworth v. Terre-Haute, Alton & St. Louis Railroad Co.*, 75.

CORPORATIONS—(Continued.)

4. A foreign corporation having its chief office or place of business in this state, may, it seems, be sued, as if resident here, by ordinary writ of summons. *Id.*
5. In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority or a vote or resolution of the corporate authorities. *Williams v. Christian Female College*, 250.
6. When a member of the board of trustees of a corporation, at a session of the board, makes a statement in respect to its action, and such statement is allowed to pass uncontradicted, such statement, although evidence against the board, is not conclusively binding upon it. *Id.*
7. Where the officers of a municipal corporation, without authority, assess against a person for taxation land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for non-payment of taxes, buy the same at the tax sale and convey the same upon redemption, the corporation will not be estopped, by these acts of her officers and agents, to claim the property as her own. *City of St. Louis v. Gorman*, 593.

COUNTIES.

See COUNTY COURTS.

COUNTY COURTS.

See INSANE PERSONS.

1. The county courts are not agents of their respective counties in exercising their statutory jurisdiction over probate matters, guardians, minors, lunatics, idiots, &c. In this field of jurisdiction they are a branch of the state judiciary, and the counties can not be held responsible for their action. *Miller v. Iron County*, 122.
2. An appeal will not lie under the general law of this state by a county from a judgment of a county court allowing an account against the same. *Whitehead v. Stoddard County*, 138.
3. This rule applies to the district county court organized under the act of March 1, 1855, (Sess. Acts, 1855, p. 474,) for the counties of Stoddard, Dunklin and Butler. *Id.*

COUNTY COLLECTOR.

See REVENUE.

COUNTY SURVEYOR.

See ROADS AND HIGHWAYS.

COURTS.

1. The county courts are not agents of their respective counties in exercising their statutory jurisdiction over probate matters, guardians, minors, lunatics, idiots, &c. In this field of jurisdiction they are a branch of the state judiciary, and the counties can not be held responsible for their action. *Miller v. Iron County*, 122.

CREDITORS.

See DOWER, 1, 2. FRAUD AND FRAUDULENT CONVEYANCES. ASSIGNMENTS.



## CRIMES AND PUNISHMENTS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. Where three persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, and the one indicted as principal in the first degree is put upon his trial first and acquitted, the record of his acquittal is inadmissible in evidence in favor of the others. *State v. Ross*, 32.
2. Where several persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, each defendant may be tried as principal either in the first or second degree. *Id.*
3. Where a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree, and a new trial is ordered at his instance, he can not legally be put upon his trial again upon the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree. (*Scott*, Judge, dissenting.) *Id.*
4. To authorize the giving of instructions, there must be facts in evidence upon which to base them; nor should they contain comments upon the testimony. *Id.*
5. In the case of a joint indictment of several for the joint commission of a crime, when once the conspiracy or combination is established, the act or declaration of one conspirator in the prosecution of the common enterprise is admissible in evidence against all. Acts or declarations of one, made after the common enterprise is ended, whether by accomplishment or abandonment, are not admissible in evidence against the others. *Id.*
6. The rule requiring *prima facie* proof of the conspiracy or combination to be first made before the act or declarations of one conspirator or accomplice can be admitted against the others is not inflexible; the judge may, in his discretion, under peculiar and urgent circumstances, permit such acts and declarations to be introduced before sufficient proof is given to establish the conspiracy or combination. *Id.*
- 7 The ninth section of the first article of the act concerning jurors (R. C. 1855, p. 910), which provides that "no exception to a juror on account of his citizenship, nonresidence, state, or age, or other disability, shall be allowed after the jury are sworn," does not apply to the objection that the juror had formed or delivered an opinion on the issue or any material fact to be tried; if the latter objection be made on a motion for a new trial, the court must entertain it. *Id.*
8. It is not incumbent upon the State in a prosecution for murder, if there is a failure to prove that the mortal blow was struck with the weapon mentioned in the indictment, to prove what the weapon used was. *State v. Cushing*, 215.
9. The twenty-fifth section of the fourth article of the act regulating practice in criminal cases, (R. C. 1855, p. 1176,) which prescribes that if a defendant be indicted by a wrong name, and he does not declare his true name before pleading, he shall be proceeded against by the name in the indictment; if he allege that another name is his true name, it must be entered on the minutes of the court, and after such entry the

## CRIMES AND PUNISHMENTS—(Continued.)

- trial and all other proceedings shall be had against him by that name, referring also to that name by which he is indicted, &c.—is constitutional. *State v. Schricker*, 265.
10. The general assembly has power under the constitution to create municipal corporations and to confer upon them the authority to pass police regulations and to punish persons for their violation. *State v. Cowan*, 330.
  11. If a municipal corporation created by the law of this state should take cognizance of an act made an offence by its ordinances and punish it, the person thus punished can not be subjected again, under the general law of the state, to punishment for the same act or offence. *Id.*
  12. The general assembly has power under the constitution to enact that, for offences of the grade of misdemeanors, persons may be proceeded against criminally either by indictment or by information. *Id.*
  13. Although by the general law of the state persons charged with certain offences of the grade of misdemeanors must be proceeded against criminally by indictment, yet the general assembly may grant to municipal corporations the power to ordain that persons charged with such offences may be proceeded against criminally by information. The general state law and the municipal ordinance may have a concurrent operation. *Id.*
  14. Where an indictment contains two counts, one founded on the 35th, the other upon the 39th, section of the second article of the act concerning crimes and punishments, (R. C. 1855, p. 565, 567,) and both counts relate to the same transaction, the defendant is not entitled to demand that the prosecution shall select the count upon which the defendant shall be tried. *State v. Davis*, 391.
  15. Every felonious act must be charged to have been feloniously done; this requirement will be satisfied, in an indictment founded upon the 39th section of the second article of the act concerning crimes and punishments (R. C. 1855, p. 567,) by an averment that the assault was made feloniously and that the striking, cutting and thrusting were done feloniously, although the maiming, wounding, disfiguring or doing great bodily harm may not be directly charged to have been done feloniously. *Id.*
  16. Principals in the first and second degrees are in law equally guilty; there is no difference in the grade of their offences. The one charged as principal in the first degree, if properly indicted himself, can not take advantage of defective averments, if any, against those indicted as principals in the second degree. *Id.*
  17. It is not good cause of challenge to a juror in a criminal case that he has formed or delivered an opinion on the issue or any material fact to be tried, if it appear that such opinion is founded only on rumor and not such as to prejudice or bias his mind. (R. C. 1855, p. 1191, § 14.) *Id.*
  18. In an indictment for selling liquor without a license it is not necessary to state to whom the sale was made, or that it was made to some person or persons to the jurors unknown. *State v. Spain*, 415.

CRIMES AND PUNISHMENTS—(*Continued.*)

19. An indictment, founded on the fifteenth section of the seventh article of the act concerning crimes and punishments (R. C. 1855, p. 620), which charges that the defendant did wilfully and unlawfully disturb the peace of a neighborhood "by then and there cursing and swearing, and by loud and abusive and indecent *language*," is sufficient. *State v. Fogerson*, 416.
20. To sustain the charge made in an indictment founded on that section it is not necessary to show that every person in the neighborhood was disturbed; nor would the testimony of individuals be admissible in behalf of defendant to show that they were in the neighborhood and they were not disturbed. *Id.*
21. An indictment for a felonious assault with intent to kill is not rendered defective by any omission to charge therein that the offence was committed "on purpose and of malice aforethought." *State v. Stewart*, 419.
22. In an indictment for a felonious assault with intent to kill, the question of the intent of the accused is a question of fact for the jury; it may mislead them to instruct that the "law presumes that every man intends the necessary and probable consequences of his acts." *Id.*
23. An indictment charging that the defendant "on, &c., at, &c., did unlawfully sell intoxicating liquors in less quantity than one gallon without then and there having a dram-shop keeper's license, or any other authority," &c., is insufficient; the indictment should set forth the particular acts constituting the violation of the law upon which the indictment is framed. *State v. Cox*, 475.

## CRIMINAL LAW.

See CRIMES AND PUNISHMENTS. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

## D

## DAMAGES.

See AGREEMENT, 4, 5, 6. PARTNERSHIP, 5, 6.

## DAY IN COURT.

See MINORS.

## DECREE.

See PARTNERSHIP, 3. JUDGMENTS.

## DEDICATION TO THE PUBLIC.

1. Where streets of a town have once been dedicated to the public, the proprietors can not resume the property in such streets; there may be a dedication to the public of the streets of a town although the proprietors laying out such town may not comply with the provisions of the act concerning the plats of towns and villages. (R. C. 1845, p. 1055.) *Ragan v. McCoy*, 356.

## DEFECTIVE ACKNOWLEDGMENT.

See CONVEYANCES. TOWN PLATS.

## DELINQUENT LIST.

See REVENUE.

## DEPOSITIONS.

See EVIDENCE. PRACTICE.

1. Where a party to a suit seeks to read in evidence a deposition taken in the cause on the ground that the witness resides at a greater distance than forty miles from the place of trial, he must prove that fact; the statement of the deponent in his deposition is not admissible in evidence for that purpose. *Grinnan v. Mockbee*, 345.

## DIVORCE.

1. Where the evidence in a divorce case is conflicting, and the decision of the court that tries the cause depends upon the credibility of the witnesses, the supreme court will not interfere. *Stevenson v. Stevenson*, 95.
2. Where a wife seeks a divorce from her husband she must separate herself from his bed; she can not expect to maintain her suit and share his bed at the same time. *Harper v. Harper*, 301.
3. Courts will not grant divorces to those who, by a long course of ill-advised and imprudent conduct, have produced such a state of alienation of feeling as would, if unexplained, seemingly warrant a divorce. *Id.*

## DOWER.

1. The mere right of a widow to dower before an assignment to her is not such an interest or estate as can be levied on and sold under an execution against her or a subsequent husband; the dower must first be assigned to the widow. *Walter v. Mardus*, 25.
2. Should the mere right of a widow to dower before assignment be levied on and sold under a judgment against a subsequent husband, the purchasers would not be creditors within the meaning of the thirty-first section of the dower act of 1845 (R. C. 1845, p. 435), or the thirty-eighth section of the dower act of 1855 (R. C. 1855, p. 676.) *Id.*
3. A husband dying, his widow and heirs made a division of his estate, including slaves, among them. The widow afterwards dying, the administrators of the husband instituted suit against persons claiming under the widow for the possession of certain slaves that had been assigned to the widow. *Held*, that a bond executed by the heirs at the time of the division and by which they bound themselves to abide by the division, but which was not signed by the widow, though read over to her and not objected to, was admissible in evidence as part of the *res gestæ*, in behalf of the administrators, to show that the assignment was made to the widow as dower and not absolutely. *Salmon's Adm'rs v. Davis*, 176.
4. Declarations of a person in possession of personal property as dowress for life only, can not be received in evidence to elevate her estate into an absolute one. *Id.*
5. Where a lot with a dwelling-house thereon is owned by two persons as tenants in common, and one dies in possession of the whole, leaving a widow residing therein, she will not be entitled, under the sixteenth section of the dower act of 1845 (R. C. 1845, p. 432) as against the sur-

**DOWER—(Continued.)**

viving tenant in common, to remain in possession of the whole lot until dower is assigned her. *Collins v. Warren*, 236.

6. A deed of gift of slaves made by a husband in anticipation of death and with a view to defraud his widow of her dower in such slaves will be held void as against the widow. *Tucker v. Tucker*, 350.
7. A bequest of personal property by a husband to his wife would be no bar, under the tenth section of the dower act of 1845, (R. C. 1845, p. 431,) to her right of dower in the real estate of the husband. *Pemberton v. Pemberton*, 408.
8. Whether such a bequest would, if accepted, be a bar to the widow's right of dower in the residue of the personal estate must depend upon the intent and meaning of the will of the husband. If it is manifest from a fair construction of the will that the testator intended the bequest to be in lieu of dower, the widow must make her election; she can not accept the bequest and also claim dower as allowed by law. *Id.*

**DRUNKENNESS.**

1. Drunkenness does not render a deed made under its influence absolutely void, but only voidable; so long as the grantor in the deed acquiesces in it, it can not be impeached by third persons on the ground that it was executed by him when drunk. *Eaton's Adm'r v. Perry*, 96.

**DUNKLIN COUNTY.**

See COUNTY COURTS.

**E****EJECTMENT.**

1. The following is not a sufficient finding of the facts, in an action of ejectment, within the meaning of the practice act of 1849: "This cause being submitted to the court for trial, the court finds that said defendant is not guilty of unlawfully withholding from said plaintiff the possession of the premises in the petition mentioned in manner and form as therein stated; it is therefore considered by the court," &c. *Bailey v. Wilson*, 21.
2. Where an action of ejectment is brought against several, and it appears that their possession is not joint, but several and adverse, of separate portions of the tract claimed, the plaintiff may be required to elect against which of the defendants he will proceed to take judgment. *Keene v. Barnes*, 377.

**ELECTION.**

See WILLS AND TESTAMENTS. DOWER.

**ENTRY.**

See LANDS AND LAND TITLES.

**EQUITY.**

See FRAUD AND FRAUDULENT CONVEYANCES.

1. Where land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and

## EQUITY—(Continued.)

- the purchase money is applied in extinguishment of a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase money. *Valle's Heirs v. Fleming's Heirs*, 152.
2. A., being indicted for the murder of B., employed C. as attorney-at-law to defend him. As compensation for the services to be rendered, A. conveyed to C. a tract of land. C., after rendering some service as attorney, died, and D. was employed as attorney to defend A. As compensation for professional services rendered, A. conveyed to D. the same land previously conveyed to C. *Held*, that there was no equity in favor of D. that would entitle him to have the conveyance to C. set aside and the title vested in himself in whole or in part. *King v. Blennerhassett*, 174.
  3. A person standing in a fiduciary relation to another will not be permitted, in the management of the property committed to his charge, to derive an advantage at the expense of his *cestui que trust*. *Jamison v. Glascock*, 191.
  - 4 This rule applies to the case where a person, in whose favor another has confessed a judgment, accepts a power of attorney constituting him an agent of the latter to dispose of certain lots and parcels of land, and then has an execution issued upon the judgment by confession and levied upon those lots, and purchases the same himself at sheriff's sale. *Id.*
  5. Where two own a tract of land as tenants in common, and a third person acquires title to a portion thereof by adverse possession under the statute of limitations, the portion thus lost will be the common loss of the two estates held in common, and will be distributed between them according to their respective interests. *Pipkin v. Allen*, 229.
  6. A. conveyed certain real estate to B. in trust to secure a debt due C. Afterwards D. obtained a judgment against A. and the interest of A. in said real estate was levied on and sold under the judgment, and D. became the purchaser. Previous to this purchase the trust debt had been satisfied. The trustee (B.) afterwards sold said real estate under the deed of trust and C. became the purchaser. *Held*, that D. was entitled to a decree of title against C. *Blanchard v. Baker*, 441.

## ESTOPPEL.

See PARTNERSHIP, 3. LANDS AND LAND TITLES, 11, 12, 13, 14, 15. COURTS. JUDGMENTS OF SISTER STATES.

1. Where the officers of a municipal corporation, without authority, assess against a person for taxation land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for nonpayment of taxes, buy the same at the tax sale and convey the same upon redemption, the corporation will not be estopped, by these acts of her officers and agents, to claim the property as her own. *City of St. Louis v. Gorman*, 593.



## EVIDENCE.

See CRIMES AND PUNISHMENTS, 1, 5, 6. DEPOSITIONS.

1. Where three persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, and the one indicted as principal in the first degree is put upon his trial first and acquitted, the record of his acquittal is inadmissible in evidence in favor of the others. *State v. Ross*, 32.
2. To authorize the giving of instructions, there must be facts in evidence upon which to base them; nor should they contain comments upon the testimony. *Id.*
3. In the case of a joint indictment of several for the joint commission of a crime, when once the conspiracy or combination is established, the act or declaration of one conspirator in the prosecution of the common enterprise is admissible in evidence against all. Acts or declarations of one, made after the common enterprise is ended, whether by accomplishment or abandonment, are not admissible in evidence against the others. *Id.*
4. The rule requiring *prima facie* proof of the conspiracy or combination to be first made before the act or declarations of one conspirator or accomplice can be admitted against the others is not inflexible; the judge may, in his discretion, under peculiar and urgent circumstances, permit such acts and declarations to be introduced before sufficient proof is given to establish the conspiracy or combination. *Id.*
5. The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers. *Carman v. Johnson*, 84.
6. Where a contractor engages to construct buildings with pressed brick fronts, and he uses a brick of inferior quality, the relative cost of pressed brick and the kind of brick used is a proper matter to be considered by the jury in ascertaining the compensation to be allowed the contractor. *Marsh v. Richards*, 99.
7. Slaves were devised by a husband to his widow for life, with remainder to their children at her death. The persons appointed by the will to make the division among the heirs, with the consent of the widow made a division of the slaves among the heirs and widow, she reserving the right to take back the slaves at any time she should choose to do so. This condition was not communicated to the heirs. Held, that the acts and declarations of the heirs were inadmissible in evidence against the widow to show that she had consented to an unconditional surrender of the slaves allotted and an abandonment of her life estate, unless it were shown that she had knowledge of, or assented to, or acquiesced in, such acts and declarations, in some form or other. *McCune v. McCune*, 117.
8. Instructions given to a jury should be supported by the evidence. *Gibson v. Tong*, 133.
9. The possession of a tenant for life is not adverse to the reversioner or remainderman; and he can not, by his acts and declarations, make his

## EVIDENCE—(Continued.)

- possession adverse so as to enable him to invoke the statute of limitations. *Salmons' Adm'rs v. Davis*, 176.
10. A husband dying, his widow and heirs made a division of his estate, including slaves, among them. The widow afterwards dying, the administrators of the husband instituted suit against persons claiming under the widow for the possession of certain slaves that had been assigned to the widow. *Held*, that a bond executed by the heirs at the time of the division and by which they bound themselves to abide by the division, but which was not signed by the widow, though read over to her and not objected to, was admissible in evidence as part of the *res gestæ*, in behalf of the administrators, to show that the assignment was made to the widow as dower and not absolutely. *Id.*
  11. Declarations of a person in possession of personal property as dowress for life only, can not be received in evidence to elevate her estate into an absolute one. *Id.*
  12. Where a contract is reduced to writing, the written instrument is presumed to contain the whole contract; parol evidence is inadmissible to contradict or vary its terms. *Peers v. Davis' Adm'rs*, 184.
  13. To warrant the reversal of a judgment on the ground of the admission of irrelevant testimony, it must appear that it was calculated to mislead the jury. *Hahn's Adm'r v. Sweazea*, 199.
  14. Where an administrator's deed conveying lands refers to the report of sales made by the administrator to the county court, such report, together with a plat of lots sold accompanying it, will be regarded as incorporated with the deed for purposes of construction and interpretation; they will be admissible in evidence to determine the boundaries of the land conveyed by the administrator's deed. *Orrick v. Bowser*, 210.
  15. It is improper to direct a jury, in a criminal case, to disregard the entire evidence of a witness if they believe him false in any particular. *State v. Cushing*, 215.
  16. The courts should not, in instructing juries, comment upon the testimony. *Id.*
  17. Where an instrument in writing signed by a party is offered in evidence against him to prove facts recited therein, it will not, if otherwise relevant and competent, be rendered inadmissible by reason of an erasure upon it, whether material or not; that circumstance will be open to comment and for the consideration of the jury. *Parker's Adm'r v. Moore*, 218.
  18. In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority or a vote or resolution of the corporate authorities. *Williams v. Christian Female College*, 250.
  19. When a member of the board of trustees of a corporation, at a session of the board, makes a statement in respect to its action, and such statement is allowed to pass uncontradicted, such statement, although evidence against the board, is not conclusively binding upon it. *Id.*
  20. Though there is a presumption of law that a fact continuous in its nature, such as marriage, continues after its existence is once shown, yet

## EVIDENCE—(Continued.)

- this presumption should not be permitted to overthrow the presumption of law in favor of innocence. *Klein v. Laudman*, 259.
21. A. and B. as husband and wife sued C. in an action of slander for words spoken. They proved their marriage. Declarations made by the wife of B., to the effect that previous to her marriage to A. she had been married in Germany to another man, were admitted in evidence in favor of C. to show the marriage with A. invalid. *Held*, that the law, under such circumstances, would presume in favor of the innocence of B. in contracting the second marriage, that the first marriage had been dissolved by death or decree of divorce. *Id.*
  22. *Quere*, whether the declarations of the wife would be admissible in such case to prove the former marriage. *Id.*
  23. A written contract is presumed to contain the whole contract entered into between the parties thereto. *Smith's Admr's v. Thomas*, 307. *Cheatam v. Hill*, 311.
  24. In a suit upon a promissory note absolute on its face, parol evidence is inadmissible to show that, though absolute in form, it was payable only upon a contingency, or that in a certain event only one-half the amount was to be paid. *Smith's Admr's v. Thomas*, 307.
  25. Declarations with respect to partnership transactions by one partner are not evidence against the other partners unless made during the existence of the partnership. *Flowers v. Helm*, 324.
  26. When an instrument, of whatever solemnity, is offered merely as containing an admission against the party executing it, it is competent for him to explain it. *Duncan v. Matney*, 368.
  27. In a suit on a promissory note in which the defendant sets up as a defence that his name was forged by one of the joint makers, the defendant can not show, in support of his defence, that the alleged forger was a fine penman and had great skill in imitating the handwriting of others, so as to deceive even the person whose name he forged; nor can it be shown that such person had committed other forgeries. *Dow's Exec'r v. Spenny's Exec'r*, 387.
  28. Nor would it be competent for the plaintiff in such case to introduce in evidence papers known to be in the handwriting of the defendant in order that the jury might compare the signature upon the paper with that upon the note sued on. *Id.*
  29. Testimony can not be introduced to show that a witness had made statements contradictory of those made upon the witness stand, unless a foundation be first laid for such testimony by calling the witness' attention to the matter about which he is to be contradicted and thus giving him an opportunity to explain. *State v. Davis*, 391.
  30. Parol evidence is inadmissible to show that a note absolute on its face is payable at a time different from that stated therein. *Inge v. Hance*, 399.
  31. The law does not presume from the simple fact of one man's handing over money to another, that the transaction is *prima facie* a loan. *Gerding v. Walter*, 426.
  32. Interest in the event of a suit will not disqualify a witness; he must, to

EVIDENCE—(Continued.)

- be rendered incompetent, be a person for whose benefit the suit is prosecuted or defended. *Riddles v. Aiken*, 453.
33. The fact, that the plaintiff in a suit has engaged to pay over to another the sum sued for when recovered, does not render such person an incompetent witness in behalf of the plaintiff as being the person for whose benefit the suit is prosecuted. *Gott v. Williams*, 461.
  34. The admission of testimony that is merely irrelevant is no ground for the reversal of a judgment unless the testimony tends to mislead or prejudice the jury. *Blair v. Corby*, 480.
  35. Questions of variance should be raised at the trial, so that an opportunity for amendments may be afforded. *Id.*

EXECUTION.

See CONSTABLE; PARTNERSHIP; EQUITY; SCHOOLS; SHERIFF'S SALES. LANDS AND LAND TITLES, 7.

1. The mere right of a widow to dower before an assignment to her is not such an interest or estate as can be levied on and sold under an execution against her or a subsequent husband; the dower must first be assigned to the widow. *Walter v. Mardus*, 25.
2. Where under a judgment against several persons for a partnership debt a levy is made upon partnership property or upon the private property of one partner, and one of the partners purchases the same at the execution sale, the sheriff's sale will not, it seems, operate in equity a transfer of the title to the purchaser; it will still be subject to levy under the same judgment, if the same remain unsatisfied. *Evans v. Gibson*, 223.
3. Where one partner expends the partnership funds in the purchase of property in his own name, he will hold the same in trust for the partners. *Id.*
4. If the defendant in an execution, a head of a family, have none of the articles of property enumerated in the first and second clauses of the twelfth section of the act regulating executions, (R. C. 1855, p. 738,) he may select and hold exempt from execution, under the thirteenth section of said act, any other property not exceeding in value one hundred and fifty dollars. *Mahan v. Scruggs*, 282.
5. If he have a portion only of the articles enumerated in said first and second clauses of the twelfth section of said act, he may select them as exempt under the twelfth section, and he may also, under the thirteenth section, select, in addition, other property, which, together with that selected under the twelfth section, will not exceed in value one hundred and fifty dollars. *Id.*
6. The title acquired by virtue of a sale under an erroneous judgment or decree is good and valid although the judgment or decree should afterwards be reversed, provided there is no stay of execution and no supersedeas at the time such sale is made. *Shields v. Powers*, 315.
7. Under executions issued upon judgments of the Weston court of common pleas, the marshal of the city of Weston may levy upon and sell real estate. He may make such sale in the city of Weston, where the court is held. (Sess. Acts, 1851, p. 203.) *Blanchard v. Baker*, 441.

EXECUTION—(*Continued.*)

8. From the date of the delivery of an execution issued by a justice of the peace to the constable, it is a lien on the personal property of the defendant "found within the limits within which the constable or other officer can execute the process." The lien commences only upon such delivery. (R. C. 1855, p. 964, § 5.) *Gott v. Williams*, 461.
9. Where a judgment is rendered by a justice of the peace of one township and the defendant resides in another, and the execution issued is directed to the constable of the township in which the judgment is rendered, the lien of the execution will be coextensive with the county. (R. C. 1855, p. 964, § 6.) *Id.*
10. The officer receiving an execution from a justice of the peace should endorse thereon the time of its receipt. The docket of the justice can not be received in evidence to show the date of the receipt of the execution by the constable. *Id.*

## EXECUTORY BEQUESTS AND DEVISES.

See WILLS AND TESTAMENTS.

## F

## FEES.

1. The clerk of the St. Louis criminal court is entitled to the fees allowed by the third section of the act of February 12, 1857. (Sess. Acts, 1857, p. 63.) He is not restricted to the fees allowed in the eleventh section of the act of December 5, 1855. (R. C. 1855, p. 766.) *Kretschmar v. St. Louis County Commissioners*, 124.

## FINDING OF THE FACTS.

See PRACTICE.

## FORCIBLE ENTRY AND DETAINER.

1. A complaint in an action of forcible entry and detainer—which charges that the plaintiff was "lawfully possessed" of the premises in controversy, that the defendant "unlawfully entered and detained the same," and was thereby guilty of a forcible entry and detainer—is good. *Wade v. McMillen*, 18.
2. In an action of forcible entry and detainer, the issue to be submitted to the jury is whether the plaintiff was lawfully, that is, peaceably, in possession of the premises sought to be recovered and the defendant unlawfully entered; the right of entry or of possession are not involved in the issue. *Beeler v. Caldwell*, 72.
3. In an action for a forcible entry and detainer the title to the premises can not be inquired into. Mere title in the plaintiff at the time of the alleged entry, unaccompanied by possession, can avail him nothing. *Gibson v. Tong*, 133.

## FRAUD AND FRAUDULENT CONVEYANCES.

See STATUTE OF FRAUDS.

1. A patent obtained by fraud will enure to the benefit of the person in fraud of whose rights it is obtained. *Carman v. Johnson*, 84.

## FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

2. The first section of the act concerning fraudulent conveyances does not embrace deeds founded upon a valuable consideration. *Eaton's Adm'r v. Perry*, 96.
3. The fact that a mother, intending to preserve the property of a disolute and spendthrift son for his future support, procures a deed of conveyance thereof to herself, can not of itself, no debts of the son at the date of the execution of the deed appearing, make the deed void. *Id.*
4. A stipulation in a deed of trust of land and slaves, which is duly recorded, that the grantor shall remain in possession of the property conveyed until the maturity of the debt secured, does not of itself render such deed of trust void on its face as to creditors by constituting it a conveyance to the use of the grantor within the meaning of the first section of the act concerning fraudulent conveyances. *Howell v. Bell*, 135.
5. An agreement to purchase land at a sheriff's sale and to hold it in trust for another is within the third section of the statute of frauds; it must be in writing. *Hammond's Adm'rx v. Cadwallader*, 166.
6. False representations made by a vendor in the sale of a chattel, to amount to a fraud upon the purchaser, must be known to be false when made, and made with intent to deceive. *Peers v. Davis' Administrators*, 184.
7. A justice of the peace rendered a judgment against A. and B. A. dying, an execution was issued and levied upon certain property as the property of B., and the constable sold the same. Previous to the issuing of the execution by the justice, A. had sold and conveyed said property to C. *Held*, in a suit by C. against the constable to recover damages for a wrongful levy, in which suit it was assumed that A. had title to the property at the time of his transfer to C., that the defendant was not in a position to make out a defence by showing that A. had transferred the property to C. with a view to defraud his creditors. *Barley v. Tipton*, 206.
8. There is nothing in the act concerning voluntary assignments, (R. C. 1855, p. 202,) which authorizes the circuit court, on a motion of a creditor, to direct the assignee to let in such creditor and allow him to prove up his demands against the assigned effects. *January v. Powell & Co.'s Assignee*, 241.
9. If the assignee improperly refuse to allow the creditor to prove his claim, the proper remedy for the creditor to resort to is a writ of mandamus. *Id.*
10. A deed of gift of slaves made by a husband in anticipation of death and with a view to defraud his widow of her dower in such slaves will be held void as against the widow. *Tucker v. Tucker*, 350.

## G

## GUARDIAN.

See INSANE PERSONS.



## H

## HEAD OF FAMILY.

See EXECUTIONS.

## HUSBAND AND WIFE.

1. Though there is a presumption of law that a fact continuous in its nature, such as marriage, continuous after its existence is once shown, yet this presumption should not be permitted to overthrow the presumption of law in favor of innocence. *Klein v. Laudman*, 259.
2. A. and B. as husband and wife sued C. in an action of slander for words spoken. They proved their marriage. Declarations made by the wife of B., to the effect that previous to her marriage to A. she had been married in Germany to another man, were admitted in evidence in favor of C. to show the marriage with A. invalid. *Held*, that the law, under such circumstances, would presume in favor of the innocence of B. in contracting the second marriage, that the first marriage had been dissolved by death or decree of divorce. *Id.*
3. *Quere*, Whether the declarations of the wife would be admissible in such case to prove the former marriage. *Id.*

## I

## ILLEGAL BANKING.

See BANKING. CORPORATIONS.

## INDEMNITY BOND.

See PARTNERSHIP, 5, 6.

## INDEFINITE FAILURE OF ISSUE.

See WILLS AND TESTAMENTS.

## INNKEEPER.

1. An innkeeper has a lien upon the goods of guests only, not upon the goods of persons boarding with such innkeeper under a special contract. *Hursh v. Byers*, 469.

## INSANE PERSONS.

1. In proceedings under the act relating to insane persons to subject the person and estate of an alleged lunatic to control of a guardian and the county court, the alleged insane person should have notice of the proceedings, or the county court should cause him to be brought before the court, or it should appear upon the record of such proceedings why such notice was not given or such attendance required. *Dutcher v. Hill*, 271.
2. Where a guardian of an insane person has been appointed by a county court, and the guardian has under the sanction of the court sold the land of such insane person, the validity of this sale can not be called in question in a collateral proceeding on the ground that notice of the inquisition was not given to the alleged lunatic. *Id.*

## INSANE PERSONS—(Continued.)

3. Where a guardian of an insane person has been appointed by the county court, and the lunatic afterwards applies to the court to be relieved from the custody of the guardian on the ground that he has been restored to reason, this will be taken as an admission that the proceedings against him were valid, and he can not afterwards object in a collateral proceeding that the inquisition was irregular and void for want of notice to him. *Id.*
4. Where a promissory note is given to a guardian of an insane person as guardian, he may institute suit upon it in his own name. *Nickerson v. Gilliam*, 456.
5. Where the guardian institutes suit upon such note in his own name, the defendant may plead by way of set-off a debt due him from the insane ward. *Id.*

## INSTRUCTIONS.

See PRACTICE. JURY.

## J

## JUDGMENTS.

See PARTNERSHIP, 3. INSANE PERSONS. COUNTY COURTS.

1. The title acquired by virtue of a sale under an erroneous judgment or decree is good and valid although the judgment or decree should afterwards be reversed, provided there is no stay of execution and no supersedeas at the time such sale is made. *Shields v. Powers*, 315.
2. A minor against whom a decree may have been rendered is not entitled, it seems, to a day in court on attaining his majority to appear and show cause against the decree. *Id.*
3. Where a judgment by confession is rendered, under a power of attorney from the debtor, as authorized by the 24th section of the 12th article of the act concerning practice (R. C. 1855, p. 1283,) the affidavit required of the plaintiff must be made by himself; the attorney in fact or agent of the plaintiff in the confessed judgment can not make the required affidavit. *Bryant v. Harding*, 347.
4. Where a judgment is confessed irregularly, other judgment creditors are entitled to have the same set aside on motion. *Id.*

## JUDGMENTS OF SISTER STATES.

1. By the provisions of an act of the legislature of the state of Indiana the defendant in an execution was entitled to "replevy" the same, and obtain a stay of execution for a specified period by giving a bond with securities in double the amount demanded by the execution, and conditioned for the payment of the full amount of the execution, with interest and costs at the expiration of the stay of execution. This bond the officer was to return with the execution to the office of the clerk who issued the execution, and it was made the duty of the said clerk to record the same. The act further provided as follows: "And such bond, from the date of its execution, shall be taken as, and have

JUDGMENTS OF SISTER STATES—(*Continued.*)

the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue thereon accordingly." A judgment was obtained in Indiana, and a bond was duly executed and filed and recorded under the provisions of the above act. *Held*, that such bond could not be sued on in the courts of this state as a judgment of a court of the state of Indiana; that it was not entitled in this state, under the constitution of the United States and the act of Congress, to full faith and credit as a judgment of the state of Indiana. *Foote v. Newell*, 400.

2. Judgments obtained in a sister state are not entitled, under our administration act, to be classed in the fourth class of claims against the estates of decedents; they are entitled to no preference over any other debts. *Gainey v. Sexton's Adm'r*, 449.

## JURISDICTION.

See **CRIMES AND PUNISHMENTS**, 1, 3.

1. The county courts are not agents of their respective counties in exercising their statutory jurisdiction over probate matters, guardians, minors, lunatics, idiots, &c. In this field of jurisdiction they are a branch of the state judiciary, and the counties can not be held responsible for their action. *Miller v. Iron County*, 122.
2. A grant of administration by a county court is a judicial act, and as such must be conclusive on all other courts until it is revoked; the validity of such grant can not be attacked collaterally. *Naylor's Adm'r v. Moffatt*, 126.

## JURY.

1. To authorize the giving of instructions, there must be facts in evidence upon which to base them; nor should they contain comments upon the testimony. *State v. Ross*, 32.
2. The ninth section of the first article of the act concerning jurors (R. C. 1855, p. 910), which provides that "no exception to a juror on account of his citizenship, nonresidence, state, or age, or other disability, shall be allowed after the jury are sworn," does not apply to the objection that the juror had formed or delivered an opinion on the issue or any material fact to be tried; if the latter objection be made on a motion for a new trial, the court must entertain it. *Id.*
3. A party can not complain of an instruction given at his own instance. *Flowers v. Helm*, 324.
4. If there be any evidence introduced tending to prove a fact relied upon by a party to a suit, it is error to refuse instructions putting that fact to the jury. *Ridens v. Ridens*, 470.

## JUSTICES' COURTS.

See **EXECUTIONS**.

1. A constable who levies upon and sells property under an execution not directed to him and illegally in his hands, may be treated as a mere trespasser; the constable must derive his authority from the justice who rendered the judgment or his successor in office. *Barley v. Tipton*, 206.

## L

## LANDLORD AND TENANT.

1. Where premises are leased for a term of years and the lessee agrees to pay rent during such term, and the lessor does not covenant to rebuild, the destruction by fire of the buildings rented will not exempt the lessee from the further payment of rent; he must pay rent for the whole of the term. *Gibson v. Perry*, 245.

## LANDS AND LAND TITLES.

1. The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers. *Carman v. Johnson*, 84.
2. In a case arising under the act of Congress of January 12, 1825, (4 Stat. at Large, p. 80,) where the entry and purchase of land at a land office of the United States is void by reason of a prior sale by the United States, the only relief to which the purchaser is entitled is the repayment of the money paid by him. *Id.*
3. In no case do the various acts of Congress of March 3, 1819, (3 Stat. at Large, p. 526,) of May 24, 1824, (4 id. p. 31,) of January 12, 1825, (4 id. p. 80,) or of May 24, 1828, (4 id. p. 301,) entitle one entering land at a land office of the United States to a change of the entry and a transfer of the payment made to another tract, except in case such purchaser had made entry of a tract not intended to be entered by reason of a mistake as to the true numbers of the tract intended to be entered. *Id.*
4. An entry of land in a land office of the United States, made without warrant and authority of law, is a nullity. *Id.*
5. A patent obtained by fraud will enure to the benefit of the person in fraud of whose rights it is obtained. *Id.*
6. Under the act of Congress of March 2, 1821, (3 U. S. Statutes at Large, p. 612,) purchasers of the public lands who had not paid the whole purchase money might relinquish their purchases and others might be substituted in their places and might complete the purchases. *Keene v. Barnes*, 377.
7. A sale by the marshal of the United States, at the court-house in St. Louis, under a judgment of the United States district court, of lands situate in Boone county, is, it seems, valid. *Id.*
8. Under the practical construction given to the laws of the United States previous to 1836, United States surveys, when made and approved by the surveyors general, stood as the authorized governmental surveys until they were set aside by some authority having a right of supervision over the official action of the surveyors general; it was not necessary, in order that a United States survey duly made and approved by the surveyor general should become an authoritative survey, that it should be transmitted to the General Land Office, and receive the formal approval of the commissioner, or of the department to which he was subordinate. *Sigerson v. Dent*, 489.

## LANDS AND LAND TITLES—(Continued.)

9. Confirmations under the act of Congress of July 4, 1836, do not relate back to the date of the original Spanish grant or concession so as to exclude intermediate grants; they take effect only from the date of the passage of said act. *Id.*
10. The United States survey of the common of Carondelet made by Joseph C. Brown, deputy surveyor, stood as an approved and authoritative survey of the United States in the year 1834; and whether it did or did not relate back to the inception of the title to common under the act of Congress of June 13, 1812, still the title of Carondelet to the land embraced within said survey as common is superior to and must prevail over a title emanating from the United States by virtue of a confirmation under the act of Congress of July 4, 1836. *Id.*
11. Although an approved United States survey of the common confirmed to the inhabitants of a town or village by the act of June 13, 1812, is only *prima facie* evidence of the true location and extent of such common as against such town or village, yet if such survey should be accepted by such town or village, it would be conclusive and binding upon it as to the location and extent of the common confirmed, and it and the inhabitants thereof would be estopped to claim as a part of the commons of said town any land lying outside of said survey. *Carondelet v. St. Louis*, 527.
12. It is for the court to say what facts constitute an acceptance by a town or village of a survey of common, and work an estoppel. *Id.*
13. The estoppel to be binding must be mutual; if the United States are not bound by the survey, neither is the claimant of common. *Id.*
14. The existence of valid private claims within the limits of a survey of common would not be inconsistent with an estoppel as between the government and the village or town claiming common. *Id.*
15. A survey of common, if accepted at all, must be accepted as an entirety; it can not be accepted in part and rejected in part. *Id.*
16. The title of Carondelet to the land embraced within the United States survey of the commons of Carondelet made by Brown in 1834 is superior to and must prevail over an entry with the register and receiver of a portion thereof in 1847. *Funkhouser v. Hantz & Spalding*, 540.
17. An entry in 1847 in the office of the register and receiver of land embraced within Brown's survey of the commons of Carondelet was unauthorized by law and would confer no title even as against the United States. *Id.*

## LEVY.

See EXECUTIONS. SHERIFF'S SALES. LANDS AND LAND TITLES.

## LIMITATION.

1. The running of the limitation act of March 16, 1835, was suspended by the departure of the debtor from his residence out of the state. *Cook's Exec'r v. Holmes*, 61.
2. The time of limitation upon an instrument in the following form, "Received of A. for B. one hundred and eighty dollars. November 16, 1850. [Signed] C." is ten years; such an instrument is a "writing

## LIMITATION—(Continued.)

- for the payment of money" within the meaning of the first clause of the second section of the second article of the limitation act of 1845. (R. C. 1845, p. 716.) *Reyburn v. Casey*, 129.
3. The possession of a tenant for life is not adverse to the reversioner or remainderman; and he can not, by his acts and declarations, make his possession adverse so as to enable him to invoke the statute of limitations. *Salmons' Adm'rs v. Davis*, 176.
  4. When the statute of limitations begins to run against an action to adjust and settle the accounts of a partnership must depend upon the circumstances of the case; there is no rule of law that it begins to run from the date of the dissolution of the partnership. *Massey v. Tingle*, 437.
  5. The adverse possession of a disseizor, or of one who enters without right and retains possession by wrong, can not extend beyond the limits of his actual occupancy. *City of St. Louis v. Gorman*, 593.
  6. To constitute color of title some act must have been done conferring some title, good or bad, to a parcel of land of definite extent; a mere disseizor can not resort to the metes and bounds of the tract upon which he wrongfully enters. *Id.*
  7. If a person die in adverse possession of a tract of land and his son-in-law succeed him in the possession, the relation he sustains to the deceased will constitute such privity as will entitle him to connect his possession with that of the father-in-law so as to give him the benefit of the latter's adverse possession. *Id.*

## M

## MANDAMUS.

See ASSIGNMENTS.

## MARRIAGE.

See HUSBAND AND WIFE. DOWER.

## MARRIED WOMEN.

See CONVEYANCES, 3.

## MARSHAL OF CITY OF WESTON.

See EXECUTION, 7.

## MARSHAL'S SALE.

See LANDS AND LAND TITLES, 7.

## MEASURE OF DAMAGES.

See DAMAGES.

## MINORS.

1. A minor against whom a decree may have been rendered is not entitled, it seems, to a day in court on attaining his majority to appear and show cause against the decree. *Shields v. Powers*, 315.

## MISNOMER.

See CRIMES AND PUNISHMENTS.



## MORTGAGE.

1. Where land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase money is applied in extinguishment of a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase money. *Valle's Heirs v. Fleming's Heirs*, 152.

## MULTIFARIOUSNESS.

See PLEADING.

## MUNICIPAL CORPORATIONS.

See CHARITIES. CRIMES AND PUNISHMENTS.

1. The City of St. Louis, under its charter and the general law concerning corporations, has power to acquire and hold such land beyond the limits of the city as may be necessary for the purposes of the corporation; the right of the city to hold land beyond the city limits is not restricted to the specific purposes mentioned in the second section of the first article of the charter of St. Louis of March 3, 1851. *Chambers v. City of St. Louis*, 543.
2. The question whether a municipal corporation, authorized to purchase and hold real estate for certain purposes, transcends the exact limits of its power, and acquires land that it is not authorized to hold for any of the purposes of the corporation, can only be raised and determined in a proceeding instituted at the instance of the state. *Id.*
3. Municipal corporations may hold property in trust for charitable uses; they may be compelled in equity to administer and execute the trusts imposed upon them. *Id.*
4. Where the officers of a municipal corporation, without authority, assess against a person for taxation land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for non-payment of taxes, buy the same at the tax sale and convey the same upon redemption, the corporation will not be estopped, by these acts of her officers and agents, to claim the property as her own. *City of St. Louis v. Gorman*, 593.

## N

## NOTICE.

See INSANE PERSONS.

## P

## PARDONING POWER.

1. The pardoning power granted by the constitution to the governor of this state extends to the granting of pardons as well before as after conviction. *State v. Woolery*, 300.

## PARTIES.

See PLEADING.

## PARTITION.

1. To authorize the allowance, under the sixty-fifth section of the partition act (R. C. 1855, p. 1122), of a reasonable attorney's fee in favor of the attorney bringing a suit for partition, and the taxation and collection of the same as other costs, it must appear of record that the plaintiffs in partition had agreed to pay the attorney a certain fee—in which case the judge, if he deemed the sum agreed upon reasonable, might allow the same—or an agreement must be entered of record that the judge should fix the amount of the fee. *Draper v. Draper*, 13.
2. Such a decree of allowance not warranted by the facts appearing of record may be reversed on an appeal taken to the supreme court at a term subsequent to that at which the allowance is made. *Id.*
3. Where a final judgment in a partition suit has not been rendered, a writ of error will not lie. *Pipkin v. Allen*, 229.
4. *Quere*, where a court appoints three commissioners to sell and convey land, and they make a sale as directed, and after the sale and before making of the deed two of the commissioners die, whether the deed of the surviving commissioner acknowledged in open court would be valid and effectual? *Ragan v. McCoy*, 356.

## PARTNERSHIP.

1. Where under a judgment against several persons for a partnership debt a levy is made upon partnership property or upon the private property of one partner, and one of the partners purchases the same at the execution sale, the sheriff's sale will not, it seems, operate in equity a transfer of the title to the purchaser; it will still be subject to levy under the same judgment if the same remain unsatisfied. *Evans v. Gibson*, 223.
2. Where one partner expends the partnership funds in the purchase of property in his own name, he will hold the same in trust for the partners. *Id.*
3. A. and B. were partners; a lot of ground was conveyed to them. The lot was improved; a dwelling-house built thereon became the residence of B.; B., after living in it for several years, died leaving his widow in possession of it. Previous to the death of B., A. instituted a suit against B. for an adjustment of the partnership concerns, and prayed a sale of the said lot for the payment of partnership debts, it being alleged to be partnership. After the death of B., the suit was revived against his administrator only. After the institution of the suit and before the death of B., C. bought all the interest of B. in the lot at sheriff's sale, it having been mortgaged to C. A. made C. a defendant by supplemental bill, on the ground that he had purchased with notice of the rights of A. A decree was rendered against B.'s estate, and a sale of the lot was awarded, and the interest acquired by C. was postponed until the debt adjudged to A. should be first paid. At the sale under the decree A. became the purchaser of the lot. He instituted an action of ejectment against the widow of B. *Held*, that not

## PARTNERSHIP—(Continued.)

having been made a party to the suit of A. she was not bound by the decree, and it could not be used as evidence against her; that under the circumstances, the plaintiff in ejectment could only recover an undivided half of the premises and corresponding damage. *Collins v. Warren*, 236.

4. A. and B. were sued on a promissory note. It was not alleged in the petition that A. and B. were partners. B. put in a separate answer alleging that he was not a partner of A., and denying the execution of the note. The note was signed "A. & Co." The question whether B. was a partner of A. was submitted to the jury and they found for the plaintiff. *Held*, that B. was not aggrieved by the omission in the petition of the allegation that A. and B. were partners when the note was executed. *Stephens v. Frampton*, 263.
5. A. and B. were partners. A., transferring his interest to B. and retiring from the firm, took from the latter a bond of which the following is the condition: "Whereas the said B. having purchased the interest of the said A. in the firm of 'A. & B.' in the carriage business in the city of B., Mo., and has agreed with the said A. to assume all partnership liabilities of said firm incurred between April 1, 1858, and July 1, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm; now if the said B. shall observe and keep said agreement and pay said debts in manner and form above prescribed, then this bond to be void, otherwise to remain in full force and virtue." *Held*, that this was not merely a bond of indemnity to A.; that the obligation thereby created was not contingent upon A.'s being compelled to pay, or his actually paying, to the creditors of the firm the debts embraced within the bond; that a right of action on the bond accrued to A. so soon as B. failed to pay those debts on demand of the creditors. *Ham v. Hill*, 275.
6. The measure of damages in such case, it seems, would be the amount of the debts provided for in the bond; upon a proper showing, however, the court might give judgment in such form as would make the defendant safe in paying the judgment. *Id.*
7. Declarations with respect to partnership transactions by one partner are not evidence against the other partners unless made during the existence of the partnership. *Flowers v. Helm*, 324.
8. When the statute of limitations begins to run against an action to adjust and settle the accounts of a partnership must depend upon the circumstances of the case; there is no rule of law that it begins to run from the date of the dissolution of the partnership. *Massey v. Tingle*, 437.

## PLEADING.

See FORCIBLE ENTRY AND DETAINER, 1. COMMON CARRIER. PRACTICE.

1. Where different causes of action are joined in the same petition, they must each affect all the parties to the action. *Liney v. Martin*, 29.
2. Where a promissory note is made to an administrator in his representa-

## PLEADING—(Continued.)

- tive character, and such administrator dies, a suit thereon may be properly brought in the name of the executor of such administrator. *Cook's Exec'r v. Holmes*, 61.
3. When two causes of action are joined in a petition, they should be stated separately. *Marsh v. Richards*, 99.
  4. One S. died in Kentucky in 1826. No administration in form was had upon his estate, but his widow and heirs made a division of his property, and a certain female slave named Milly was, with other property, assigned to the widow. About ten years after the death of her said husband the widow removed to the state of Missouri, bringing with her said slave Milly and her children. She died in 1855, and by her will disposed of said Milly and her children. Letters of administration were afterwards taken out upon the estate of S. *Held*, that the administrators of S. were proper parties plaintiff in a suit brought for the possession of said slaves in behalf of the representatives of said S. *Salmons' Adm'rs v. Davis*, 176.
  5. No endorsement or written assignment of a promissory note is necessary to enable the holder thereof to maintain an action thereon in his own name. *Lewis v. Bowen's Adm'r*, 202.
  6. The relief afforded by the decree in a cause should conform to the case made out in the petition. *Evans v. Gibson*, 223.
  7. A petition seeking to enforce a contract concerning land is not rendered defective by reason of an omission to state therein that the contract is in writing; if the defendant rely upon the statute of frauds, he must set it up in his answer as a defence. *Gist v. Eubank*, 248.
  8. A. and B. were sued on a promissory note. It was not alleged in the petition that A. and B. were partners. B. put in a separate answer alleging that he was not a partner of A., and denying the execution of the note. The note was signed "A. & Co." The question whether B. was a partner of A. was submitted to the jury and they found for the plaintiff. *Held*, that B. was not aggrieved by the omission in the petition of the allegation that A. and B. were partners when the note was executed. *Stephens v. Frampton*, 263.
  9. Amendments of pleadings with a view to make them conform to the facts in proof, should be liberally allowed in furtherance of justice where they can not operate as a surprise. *Id.*
  10. A. sued B. to recover the value of carpentry work done for the latter; B. in his answer set up that the alleged work was done in so unworkmanlike a manner as to be valueless, and claimed by way of counter claim the sum of six hundred and four dollars that he had advanced to A. during the progress of the work, and that was allowed as a credit in the account filed with plaintiff's petition; to this counter claim no reply was filed. The court, at B.'s instance, instructed the jury that if the six hundred and four dollars advanced by B. was more than the work done was worth, they should "find for defendant whatever amount they may consider said work worth less than said sum." The jury found for plaintiff the balance claimed to be due him. *Held*, that the defendant was not, under the circumstances, aggrieved by the refusal

## PLEADING—(Continued.)

- of the court to instruct the jury that the allegations of the answer with respect to the set-off or counter claim were admitted by the pleadings to be true, *there* being no reply thereto. *Irvin v. Riddlesburger*, 340.
11. Where a person, in anticipation of death, and with a view to defraud his widow of her dower, executes, as part of the same transaction, separate deeds of gift of slaves to his children, a petition in a suit instituted by the widow against all the grantees in said deeds to obtain an annulment thereof and an assignment of dower will not be bad for multifariousness because the defendants have separate and distinct interests under the deeds. *Tucker v. Tucker*, 350.
  12. If the material fact upon which a cause of action is based be put in issue by the answer of the defendant, the plaintiff must adduce evidence in its support. *Gerding v. Walter*, 426.
  13. Though an answer to a petition may contain different defences separately stated, they must be consistent defences; in an action for slanderous words, the defendant can not be allowed in the same answer to deny and also to justify the speaking of the words charged. (R. C. 1855, p. 1233, § 14.) *Atteberry v. Powell*, 429.
  14. An answer in an action of slander justifying the speaking must confess the speaking; an answer merely stating that the words spoken are true is not sufficient as a justification; it should state the facts constituting the crime or offence imputed so that an issue of either law or fact may be found. *Id.*
  15. Where the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, or where they fail in any other respect to conform to the requirements of the law, the court may require the pleading to be made definite and certain, and otherwise to conform to the law, by amendment. (R. C. 1855, p. 1236, § 31.) *Id.*
  16. Where the petition, in an action of slander for charging the plaintiff with perjury, is defective, in that it does not state how the alleged perjury was committed, the defect will be aided by a plea of justification setting forth the circumstances under which the alleged false oath was taken. *Id.*
  17. Where a promissory note is given to a guardian of an insane person as guardian, he may institute suit upon it in his own name. *Nickerson v. Gilliam*, 456.
  18. A court may, on such terms as may be proper, amend a pleading by striking out the name of a party. If the ends of justice require it, it must permit such amendment. *Thompson v. Mosely*, 477.

## PRACTICE.

See ATTACHMENT. ASSIGNMENTS, 1, 2. EVIDENCE. CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USES. PLEADING. INSANE PERSONS. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. To authorize the allowance, under the sixty-fifth section of the partition act (R. C. 1855, p. 1122), of a reasonable attorney's fee in favor of the attorney bringing a suit for partition, and the taxation and collection of the same as other costs, it must appear of record that the plain-

## PRACTICE—(Continued.)

- tiffs in partition had agreed to pay the attorney a certain fee—in which case the judge, if he deemed the sum agreed upon reasonable, might allow the same—or an agreement must be entered of record that the judge should fix the amount of the fee. *Draper v. Draper*, 13.
2. Such a decree of allowance not warranted by the facts appearing of record may be reversed on an appeal taken to the supreme court at a term subsequent to that at which the allowance is made. *Id.*
  3. In cases tried by the court under the practice act of 1849, there should be a finding of the facts. *Bailey v. Wilson*, 21.
  4. The following is not a sufficient finding of the facts, in an action of ejectment, within the meaning of the practice act of 1849: "This cause being submitted to the court for trial, the court finds that said defendant is not guilty of unlawfully withholding from said plaintiff the possession of the premises in the petition mentioned in manner and form as therein stated; it is therefore considered by the court," &c. *Id.*
  5. Where different causes of action are joined in the same petition, they must each affect all the parties to the action. *Liney v. Martin*, 29.
  6. To authorize the giving of instructions, there must be facts in evidence upon which to base them; nor should they contain comments upon the testimony. *State v. Ross*, 32.
  7. A foreign corporation having its chief office or place of business in this state, may, it seems, be sued, as if resident here, by ordinary writ of summons. *Farnsworth v. Terre-Haute, Alton & St. Louis Railroad Company*, 75.
  8. Judgment reversed for want of a finding of the facts by the court. *Mitchell v. Williams*, 132.
  9. Where a new trial is sought on the ground of surprise by the exclusion of depositions of witnesses residing more than forty miles from the place of trial, the affidavit accompanying the motion for a new trial should set forth the testimony contained in the depositions, or at least the substance of it, so that it could be determined by the court whether it is material or not. *Peers v. Davis' Adm'rs*, 184.
  10. Surprise, in its legal acceptation, denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence could not have afforded protection. The fact that witnesses, whose depositions are taken, reside within forty miles of the place, is a fact of which the party taking such depositions can inform himself by ordinary diligence; if it be not known, the want of knowledge is to be attributed to his own *laches*, and surprise thus produced can not be ground for a new trial. *Id.*
  11. To warrant the reversal of a judgment on the ground of the admission of irrelevant testimony, it must appear that it was calculated to mislead the jury. *Hahn's Adm'r v. Sweazea*, 199.
  12. Remission of damages may be made by a plaintiff after a motion for a new trial has been overruled. *Id.*
  13. The verdict of the jury should be responsive to the issues made by the pleadings. *Parker's Adm'r v. Moore*, 218.



## PRACTICE—(Continued.)

14. The discontinuance of an action as to one or more of several defendants in an action on a contract is not a matter entirely at the discretion of the plaintiff, and the courts should not allow it to be done where it will work injustice by depriving a party of a just defence to the action. *Keithley v. May*, 220.
15. A. and B. were sued jointly on a promissory note. A. was served personally with process; B. by copy; but the sheriff returned both personally served. They not appearing at the return term, a judgment by default was rendered against both. Afterwards and during the term, the sheriff, upon leave given, amended his return, and it then appeared that B. was served by copy. B. moved the court to set aside the judgment by default, and set forth in his affidavit that he had a meritorious defence and its character. The court sustained the motion, and on motion of plaintiff dismissed the suit as to B. and rendered judgment by default against A. *Held*, that the court improperly exercised its discretion in permitting plaintiff to dismiss his action as to B. *Id.*
16. A motion for a new trial on the ground of newly discovered testimony must be supported by the affidavit of the witness or witnesses expected to testify to the newly discovered facts. *Caldwell v. Dickson*, 227.
17. Where a final judgment in a partition suit has not been rendered, a writ of error will not lie. *Pipkin v. Allen*, 229.
18. The act concerning practice in the revised code of 1855 does not authorize a finding of the facts by the court in cases tried by the court without a jury; findings of the facts will therefore be disregarded by the supreme court in cases arising since the revised code of 1855 went into effect. *Gist v. Eubank*, 248.
19. The supreme court will not grant new trials on the ground that the verdicts of juries are against the weight of evidence. *Irvin v. Riddleburger*, 340.
20. Where a judgment by default has been regularly rendered, a motion to set the same aside should be accompanied by an affidavit showing a meritorious defence and that there has been due diligence. *Campbell v. Garton*, 343.
21. A petition for a review will not lie under section 13 of article 12 of the act concerning practice in civil cases (R. C. 1855, p. 1280, § 13), if the defendant has been regularly summoned as required by law, or has appeared to the suit, and interlocutory and final judgment shall have regularly been rendered against him. *Id.*
22. Where a party to a suit seeks to read in evidence a deposition taken in the cause on the ground that the witness resides at a greater distance than forty miles from the place of trial, he must prove that fact; the statement of the deponent in his deposition is not admissible in evidence for that purpose. *Grinnan v. Mockbee*, 345.
23. Where a judgment by confession is rendered, under a power of attorney from the debtor, as authorized by the 24th section of the 12th article of the act concerning practice (R. C. 1855, p. 1283,) the affidavit required of the plaintiff must be made by himself; the attorney in fact

## PRACTICE—(Continued.)

- or agent of the plaintiff in the confessed judgment can not make the required affidavit. *Bryant v. Harding*, 347.
24. Where a judgment is confessed irregularly, other judgment creditors are entitled to have the same set aside on motion. *Id.*
  25. The trial of the issues raised in an action for the recovery of money only, to which the practice act of 1849 is applicable, is for the jury, unless a jury trial is waived; the jury should be allowed to try all the issues, the court declaring the law; it would be improper and irregular to submit portions of the issues to the jury and reserve the remainder for the determination of the court. *Ragan v. McCoy*, 256.
  26. Where an action of ejectment is brought against several, and it appears that their possession is not joint, but several and adverse, of separate portions of the tract claimed, the plaintiff may be required to elect against which of the defendants he will proceed to take judgment. *Keene v. Barnes*, 377.
  27. Motions to strike out parts of pleadings should contain the parts sought to be stricken out, or those parts should be so designated that they can be readily ascertained. *Pearce v. McIntyre*, 423.
  28. It is the province of the jury to pass upon questions of fact, not matters of law. *Massey v. Tingle*, 437.
  29. Where it appeared that on the second day of the term of a court the defendant in a suit on a promissory note, in which no answer had yet been put in, was compelled to appear before the grand jury then in session, and was still before them when the court adjourned at a time earlier than usual, and was thus prevented from filing his answer before the adjournment of the court, and did afterwards file it with the clerk on the same day; *held*, that he was entitled to have a judgment by default rendered against him on the said second day of the term set aside. (R. C. 1855, p. 1235, § 24.) *Frazier v. Bishop*, 447.
  30. A defendant filed a demurrer to the petition in the suit against him; afterwards, while the demurrer was still pending, in vacation, and without leave previously granted, the plaintiff filed with the clerk of the court an amended petition. At the next term the defendant moved the court to strike out the amended petition; the court overruled the motion, and afterwards gave judgment by default against the defendant. *Held*, that the action of the court upon the motion to strike out the amended petition cured any irregularity in filing it with the clerk in vacation without leave first granted; that the filing of the amended petition having been thus sanctioned, the original petition was superseded, and the demurrer thereto impliedly sustained. *McCollum v. Longan's Adm'r*, 451.
  31. Where the variance between the allegation in the pleading and the proof is not material, and the adverse party could not have been misled thereby to his prejudice, the court should allow an amendment without costs. *Riddles v. Aiken*, 453.
  32. The supreme court will not grant new trials on the ground that verdicts are against the weight of the evidence. *Jones v. Plummer*, 456.
  33. A court may, on such terms as may be proper, amend a pleading by

## PRACTICE—(Continued.)

striking out the name of a party. If the ends of justice require it, it must permit such amendment. *Thompson v. Mosely*, 477.

34. Questions of variance should be raised at the trial, so that an opportunity for amendments may be afforded. *Blair v. Corby*, 480.
35. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gives a return bond and receives the property sued for, and fails to prosecute the action with effect, an assessment of the value of the property and of damages for its detention may be made and judgment against the plaintiff rendered, as directed in sections eight and nine of the replevin act of 1845. Summary statutory proceedings may also be had under section nine of the eighth article of the practice act of 1849. The party may also, after the final determination of the suit, resort to his common law action on the return bond, and may recover full damages within the limit of the penalty, although no judgment may have been rendered for the return of the property or for damages. *Hansard v. Reed*, 472.
36. Where, in an action under the eighth article of the practice act of 1849, the plaintiff gave a return bond and received the property sued for, and the court sustained a demurrer to the petition, and gave judgment for costs against the plaintiff, no assessment of the value of the property or of damages for its detention being made, nor a return of the property awarded, and afterwards the court at the same term granted the plaintiff leave to amend his petition; *held*, that the grant of leave to amend impliedly set aside the judgment for costs against plaintiff and reinstated the cause; and that the cause being still undetermined it would be premature for the defendant to institute a suit on the return bond. *Id.*

## PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See CRIMES AND PUNISHMENTS. PRACTICE. EVIDENCE.

1. Where three persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, and the one indicted as principal in the first degree is put upon his trial first and acquitted, the record of his acquittal is inadmissible in evidence in favor of the others. *State v. Ross*, 32.
2. Where several persons are jointly indicted for murder, one as principal in the first degree, the others as aiders and abettors, each defendant may be tried as principal either in the first or second degree. *Id.*
3. Where a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree, and a new trial is ordered at his instance, he can not legally be put upon his trial again upon the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree. (SCOTT, Judge, dissenting.) *Id.*
4. In the case of a joint indictment of several for the joint commission of a crime, when once the conspiracy or combination is established, the act or declaration of one conspirator in the prosecution of the common enterprise is admissible in evidence against all. Acts or declarations of

## PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(Continued.)

- one, made after the common enterprise is ended, whether by accomplishment or abandonment, are not admissible in evidence against the others. *Id.*
5. The rule requiring *prima facie* proof of the conspiracy or combination to be first made before the act or declarations of one conspirator or accomplice can be admitted against the others is not inflexible; the judge may, in his discretion, under peculiar and urgent circumstances, permit such acts and declarations to be introduced before sufficient proof is given to establish the conspiracy or combination. *Id.*
  6. The ninth section of the first article of the act concerning jurors (R. C. 1855, p. 910), which provides that "no exception to a juror on account of his citizenship, nonresidence, state, or age, or other disability, shall be allowed after the jury are sworn," does not apply to the objection that the juror had formed or delivered an opinion on the issue or any material fact to be tried; if the latter objection be made on a motion for a new trial, the court must entertain it. *Id.*
  7. It is improper to direct a jury, in a criminal case, to disregard the entire evidence of a witness if they believe him false in any particular. *State v. Cushing*, 215.
  8. The courts should not, in instructing juries, comment upon the testimony. *Id.*
  9. It is not incumbent upon the State in a prosecution for murder, if there is a failure to prove that the mortal blow was struck with the weapon mentioned in the indictment, to prove what the weapon used was. *Id.*
  10. Where an indictment contains two counts, one founded on the 35th, the other upon the 39th, section of the second article of the act concerning crimes and punishments, (R. C. 1855, p. 565, 567,) and both counts relate to the same transaction, the defendant is not entitled to demand that the prosecution shall select the count upon which the defendant shall be tried. *State v. Davis*, 391.
  11. It is not good cause of challenge to a juror in a criminal case that he has formed or delivered an opinion on the issue or any material fact to be tried, if it appear that such opinion is founded only on rumor and not such as to prejudice or bias his mind. (R. C. 1855, p. 1191, § 14.) *Id.*

## PRINCIPAL AND AGENT.

## See CORPORATIONS.

1. To render a corporation responsible for the acts of its agent, a treasurer, in illegally receiving or passing bank notes of less denomination than five dollars, it is not necessary that the agent should have express authority from the corporation. *Christian University v. Jordan*, 68.
2. In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority or a vote or resolution of the corporate authorities. *Williams v. Christian Female College*, 250.
3. When a member of the board of trustees of a corporation, at a session of the board, makes a statement in respect to its action, and such statement is allowed to pass uncontradicted, such statement, although evidence against the board, is not conclusively binding upon it. *Id.*

## PRINCIPAL AND AGENT—(Continued.)

4. In the execution of a promissory note a person may adopt and ratify the signing of his name by another. *Dow's Exec'r v. Spinney's Executor*, 386.
5. The authority of an agent to make an executory contract for the sale of land need not be in writing. *Riley v. Minor*, 439.

## PROHIBITION.

See WRIT OF PROHIBITION.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## PUBLIC POLICY.

See AGREEMENT, 1.

## R

## RAILROADS.

See CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USES.

1. Where a person subscribes to the stock of a railroad company upon condition that the road should "pass" through a certain county, and on a certain designated route, it is not a condition precedent to the right of the company to demand the amount subscribed that it should actually construct and complete the road along the line designated; it is sufficient if the road be thus permanently located. *North Missouri Railroad Co. v. Winkler*, 318.
2. Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, he may recover the sum agreed upon, including the percentage, of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company. *Blair v. Corby*, 480.

## RATE-BILL.

See SCHOOLS.

## RATIFICATION.

See CONVEYANCE, 3.

## RENT.

See LANDLORD AND TENANT.

## REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## REVENUE.

1. Where a county collector advances to the treasury the whole amount of taxes chargeable against him as collector, and dies before the expi-

## REVENUE—(Continued.)

- ration of his term of office with a portion of the taxes delinquent, his successor in office is not bound, in his official capacity as collector, to collect such delinquent taxes for the benefit of the representatives of the deceased collector. He could not be held liable on his official bond for collecting and not paying over such delinquent list. If he should collect the delinquent list of his deceased predecessor, it would be as agent and not in his official capacity as collector. *State, to use, &c., v. Rollins, 267.*
2. The representatives of a deceased collector, who had made an advance of the taxes to the treasury, have a lien for the delinquent taxes, as provided by the fifty-fifth section of the third article of the revenue act of November 23, 1857. (Sess. Acts, 1857, Adj. Sess. p. 91.) *Id.*
  3. A sheriff acting under the act of the general assembly of February 27, 1843, (Sess. Acts, 1843, p. 137,) sold thirteen several tracts assessed in the names of different persons for the taxes of the year 1842. They were sold in the lump and for the aggregate taxes of that year, the taxes due on each tract separately not being stated. *Held*, that the sale and the deed made in pursuance thereof were void. *Keene v. Barnes, 377.*
  4. A county collector making sale of land for taxes under the act of February 13, 1847, (Sess. Acts, 1847, p. 119, § 10,) was bound to make his sales before the door of the court-house of the county; so also he was required to set up at the court-house door a copy of the advertisement by the register of lands of all the unredeemed lands of the state for sale, also to set up at the most public places in the county the twenty slips received from the register setting forth the lands and lots advertised in each county. If these requisites were not complied with, the sale by the collector would be invalid. *Id.*

## ROADS AND HIGHWAYS.

1. It is not obligatory upon commissioners appointed by a county court to lay out a county road to call to their aid the county surveyor or other competent surveyor; it is sufficient if the commissioners by their report designate the location of the road with sufficient certainty. *Wyatt v. Thomas, 23.*

## S

## SET-OFF.

See PLEADING, 10. INSANE PERSONS, 5.

1. Where the guardian institutes suit upon such note in his own name, the defendant may plead by way of set-off a debt due him from the insane ward. *Nickerson v. Gilliam, 456.*

## SCHOOLS.

1. If a rate-bill and warrant issued by a board of school trustees under the twelfth subdivision of the fourth section of the fifth article of the act providing for the organization of schools (R. C. 1855, p. 1437) be



## SCHOOLS—(Continued.)

regular and valid upon its face, the constable will be protected in executing it; he is not obliged to examine into the validity of those acts of the board of trustees upon the basis of which the warrant and rate-bill are issued. *Turner v. Franklin*, 285.

## SHERIFF'S SALE.

See CONVEYANCE. EXECUTIONS.

1. In order that the defendant in an execution may recover damages against a sheriff for an irregularly conducted sale of property by such sheriff, he must show some loss or damage resulting to himself as a natural and legal consequence of the irregularities and improprieties complained of; he can not fix the measure of his own damages by his voluntary act in paying money to recover back from the execution purchaser the property alleged to have been irregularly sold. *Duncan v. Matney*, 368.
2. To constitute a valid levy of an execution on real estate, it is not necessary that notice of the levy should be given by the sheriff to the defendant in the execution; nor is it necessary that he should go on the land to make the levy, if he is sufficiently informed in relation to it to describe it properly. *Id.*
3. A sheriff succeeding to office upon the resignation of his predecessor must proceed to do all things remaining to be done and performed in relation to the execution of process commenced and partly executed by his predecessor, or by the coroner, provided such acts in part execution are legal and regular. *Id.*
4. It will not invalidate a levy in real estate that the name of the county in which the land is situated is not stated in the advertisement of sale. *Id.*
5. The law is silent as to what shall constitute the evidence of a levy; it will be sufficiently regular if the memorandum of the levy be made upon a separate piece of paper and copied upon the writ of execution before its return; the officer may use his advertisement as evidence of the levy in making his return to the writ. *Id.*

## SLANDER.

1. Though an answer to a petition may contain different defences separately stated, they must be consistent defences; in an action for slanderous words, the defendant can not be allowed in the same answer to deny and also to justify the speaking of the words charged. (R. C. 1855, p. 1233, § 14.) *Atteberry v. Powell*, 429.
2. An answer in an action of slander justifying the speaking must confess the speaking; an answer merely stating that the words spoken are true is not sufficient as a justification; it should state the facts constituting the crime or offence imputed so that an issue of either law or fact may be found. *Id.*
3. Where the petition, in an action of slander for charging the plaintiff with perjury, is defective, in that it does not state how the alleged perjury was committed, the defect will be aided by a plea of justification

## SLANDER—(Continued.)

setting forth the circumstances under which the alleged false oath was taken. *Id.*

4. In an action for speaking slanderous words, it is calculated to mislead the jury to refer it to them to determine whether the defendant "in substance" spoke or published the words charged, without explaining the meaning that the law would attach to that expression in connection with the proof of the slander charged. *Id.*

## STATUTE OF FRAUDS.

1. An agreement to purchase land at a sheriff's sale and to hold it in trust for another is within the third section of the statute of frauds; it must be in writing. *Hammond's Adm'rs v. Cadwallader*, 166.
2. Where delivery of possession of land in case of a parol contract of sale has unequivocal reference to such contract and is under and by virtue of it, this will constitute such part performance thereof as will take the case out of the statute of frauds. *Price v. Hart*, 171.
3. Where a deed of a married woman is invalid by reason of a defective acknowledgment, she may ratify and confirm the same after becoming discover; a mere parol adoption would not be sufficient; it would be within the statute of frauds. *Id.*
4. A petition seeking to enforce a contract concerning land is not rendered defective by reason of an omission to state therein that the contract is in writing; if the defendant rely upon the statute of frauds, he must set it up in his answer as a defence. *Gist v. Eubank*, 248.

## STATUTES CONSTRUED AND NOTICED.

- Administration.* (R. C. 1855, p. 154, 155, § 12, 16.) *Kincheloe v. Gorman's Adm'rs*, 421. (R. C. 1855, p. 151, § 1.) *Gainey v. Sexton's Administrator*, 449.
- Assignments.* (R. C. 1855, p. 202.) *January v. Powell & Co.'s Assignee*, 241.
- Attachment.* (R. C. 1855, p. 238, § 1.) *Farnsworth v. Terre-Haute, Alton and St. Louis Railroad Co.*, 75. (R. C. 1855, p. 242, § 9.) *Beardslee v. Morgan*, 471.
- Banking, Illegal.* (R. C. 1855, p. 286, § 4, 9.) *Christian University v. Jordan*, 68.
- Boonville, Charter of.* (Sess. Acts, 1839, p. 209; Sess. Acts, 1847, p. 185.) *Werthierner v. City of Boonville*, 254.
- Constitution of Missouri.* (Art. 4, § 6.) *State v. Woolery*, 300. (Art. 13, clauses 10, 14.) *State v. Cowan*, 330. (Art. 13, clause 7.) *Evans v. Haefner*, 141.
- Corporations.* (R. C. 1855, p. 375, § 22.) *Farnsworth v. Terre-Haute, Alton and St. Louis Railroad Co.*, 75.
- Crimes and Punishments.* (R. C. 1855, p. 554.) *State v. Ross*, 32. (R. C. 1855, p. 567, § 39.) *State v. Davis*, 392. (R. C. 1855, p. 620, § 15.) *State v. Fogerson*, 416. (R. C. 1855, p. 567, § 38.) *State v. Stewart*, 419.

## STATUTES CONSTRUED AND NOTICED—(Continued.)

- District County Court.* (Sess. Acts, 1855, p. 474.) *Whitehead v. Stoddard County*, 138.
- Dower.* (R. C. 1845, p. 435, § 31; R. C. 1855, p. 676, § 38.) *Walter v. Mardus*, 25. (R. C. 1845, p. 432, § 16.) *Collins v. Warren*, 236. (R. C. 1845, p. 431, § 10.) *Pemberton v. Pemberton*, 408. See *Tucker v. Tucker*, 350.
- Dram-Shops.* (R. C. 1855, p. 683, § 1.) *State v. Cox*, 475.
- Executions.* (R. C. 1855, p. 738, § 12, 13.) *Mahan v. Scruggs*, 282. (R. C. 1855, p. 753, § 74, 62, 63, 64.) *Duncan v. Matney*, 368.
- Fees.* (Sess. Acts, 1857, p. —, § 3; R. C. 1855, p. 766, § 11, 12.) *Kretschmar v. Board of Commissioners of St. Louis County*, 124.
- Forceful Entry and Detainer.* (R. C. 1845, p. 515; R. C. 1855, p. —, § 16.) *Wade v. McMillen*, 18.
- Fraudulent Conveyances.* (R. C. 1855, p. 802, § 1.) *Eaton's Adm'r v. Perry*, 96; *Howell v. Bell*, 35.
- Frauds and Perjuries.* (R. C. 1855, p. 807, § 3.) *Hammond's Adm'rx v. Cadwallader*, 166. See *Price v. Hart*, 171.
- Hannibal & St. Joseph Railroad Co., Charter of.* Sess. Acts, 1837, p. 250, § 9.) *Hannibal & St. Joseph Railroad Co. v. Rowland*, 337.
- Insane Persons.* (R. C. 1855, p. 863.) *Dutcher v. Hill*, 271.
- Jurors.* (R. C. 1855, p. 910, § 9, 3.) *State v. Ross*, 32.
- Justices' Courts.* (R. C. 1855, p. 964, § 5, 6.) *Gott v. Williams*, 461.
- Land Laws.* (Acts of Congress of March 3, 1819, of May 24, 1824, of January 12, 1825, of May 24, 1828—3 U. S. Stat. at Large, p. 526; 4 id. p. 31, 80, 301.) *Carman v. Johnson*, 84. (Act of Congress of March 2, 1821—3 U. S. Stat. at Large, p. 612.) *Keene v. Barnes*, 377. (Acts of Congress of June 13, 1812, of July 4, 1836.) *Dent v. Sigerson*, 489; *Carondelet v. St. Louis*, 527; *Funkhouser v. Hantz & Spalding*, 520.
- Limitation.* R. C. 1835, p. 394, § 7.) *Cook's Exec'r v. Holmes*, 61. (R. C. 1845, p. 716, § 2.) *Reyburn v. Casey*, 129. See *City of St. Louis v. Gorman*, 593; *Massey v. Tingle*, 437.
- Partition.* (R. C. 1855, p. 1122, § 65, 56.) *Draper v. Draper*, 13.
- Plank Road Associations.* Sess. Acts, 1851, p. 259.) *La Grange & Monticello Plank Road Co. v. Mays*, 64.
- Practice Acts.* (Sess. Acts, 1849, p. 90, art. 15.) *Bailey v. Wilson*, 21. (R. C. 1855, p. 1228, art. 6, § 2.) *Liney v. Martin*, 28. (R. C. 1855, p. 1225, § 19.) *Keithley v. May*, 220. (R. C. 1855, p. 1280, § 13.) *Campbell v. Garton*, 343. (Id. p. 1283, § 24.) *Bryant v. Harding*, 347. (Id. p. 1233, § 14; p. 1236, § 31.) *Atteberry v. Powell*, 429. (Id. p. 1235, § 24.) *Frazier v. Bishop*, 447. (Sess. Acts, 1849, p. 82, art. 8.) *Hansard v. Reed*, 472. See generally on Practice, *Mitchell v. Williams*, 132; *Whitehead v. Stoddard County*, 138; *Peers v. Davis' Adm'rs*, 184; *Hahn's Adm'r v. Sweazea*, 199; *Caldwell v. Dickson*, 227; *Pipkin v. Allen*, 229; *Gist v. Eubank*, 248; *Stephens v. Framp-*

STATUTES CONSTRUED AND NOTICED—(*Continued.*)

- ton, 263; Grinnan v. Mockbee, 345; State v. Davis, 391; Pearce v. McIntyre, 423; McCullum v. Longan's Adm'r, 451; Thompson v. Mosely, 477.
- Practice and Proceedings in Criminal Cases.* (R. C. 1855, p. 1176, § 25.) State v. Schrieker, 265. (R. C. 1855, p. 1191, § 14.) State v. Davis, 391.
- Revenue Acts.* (Sess. Acts, 1857, Adj. Sess. p. 91, § 55.) State, to use, &c., v. Rollins, 267. (Sess. Acts, 1847, p. 119, § 10; Sess. Acts, 1843, p. 137.) Keene v. Barnes, 377.
- Roads and Highways.* (R. C. 1855, p. 1367.) Wyatt v. Thomas, 23.
- St. Louis, Charter of.* (Sess. Acts, 1851, p. 155.) Chambers v. City of St. Louis, 543.
- Schools.* (R. C. 1855, p. 1437, § 4.) Turner v. Franklin, 285.
- Taxes.* (Sess. Acts, 1843, p. 137.) Keene v. Barnes, 377.
- Town Plats.* (R. C. 1845, p. 1055.) Ragan v. McCoy, 356.
- Weston Court of Common Pleas.* (Sess. Acts, 1851, p. 203.) Blanchard v. Baker, 441.
- Witnesses.* (R. C. 1855, p. 1577, § 6.) Riddles v. Aiken, 453.

STAY OF EXECUTION.

See JUDGMENTS. EXECUTIONS.

STODDARD COUNTY.

See COUNTY COURTS.

SUBSCRIPTION TO STOCK.

See AGREEMENT.

SUPERSEDEAS.

See JUDGMENTS. EXECUTIONS.

SURPRISE.

See PRACTICE.

SURVEYOR.

See ROADS AND HIGHWAYS.

SURVEYS.

See LANDS AND LAND TITLES.

T

TAXES.

See REVENUE.

TAX SALE.

See REVENUE.

1. Where the officers of a municipal corporation, without authority, assess against a person for taxation land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for nonpayment of taxes, buy the same at the tax sale and convey the same upon

**TAX SALE—(Continued.)**

redemption, the corporation will not be estopped, by these acts of her officers and agents, to claim the property as her own. *City of St. Louis v. Gorman*, 593.

**TENANTS IN COMMON.**

1. Where two own a tract of land as tenants in common, and a third person acquires title to a portion thereof by adverse possession under the statute of limitations, the portion thus lost will be the common loss of the two estates held in common, and will be distributed between them according to their respective interests. *Pipkin v. Allen*, 229.
2. Where a person, owning a tract of land containing, say twelve hundred acres, conveys five hundred acres thereof, not designating the land conveyed by metes and bounds, the purchaser will hold an undivided interest in the whole proportional to the number of acres conveyed to him. *Id.*
3. Where a lot with a dwelling-house thereon is owned by two persons as tenants in common, and one dies in possession of the whole, leaving a widow residing therein, she will not be entitled, under the sixteenth section of the dower act of 1845 (R. C. 1845, p. 432) as against the surviving tenant in common, to remain in possession of the whole lot until dower is assigned her. *Collins v. Warren*, 236.
4. Where two persons are tenants in common of land, and one of them receives a benefit therefrom, but in nowise interferes with the joint use of the land by the other, and does not affect its value in any manner, it would seem that he does not render himself liable to account to such other joint tenant for a proportionate share of the benefit received. *Ragan v. McCoy*, 356.

**TORTS.**

See **WASTE**.

**TOWN PLATS.**

1. The acknowledgment of the plat of a town by the proprietors under the act of February 12, 1845, (R. C. 1845, p. 1055,) is not rendered defective by reason of a failure of the person taking the acknowledgment to state in the certificate the fact that the persons making the same were personally known to him to be the persons executing the plat. *Ragan v. McCoy*, 356.

**TRESPASS.**

See **WASTE**.

**V****VENDORS AND PURCHASERS.**

See **CONVEYANCE. AGREEMENT. STATUTE OF FRAUDS.**

1. When a person parts with his property, he may attach such lawful conditions to the transfer as he thinks proper. *McCune v. McCune*, 117.
2. Slaves were devised by a husband to his widow for life, with remainder to their children at her death. The persons appointed by the will to

## VENDORS AND PURCHASERS—(Continued.)

- make the division among the heirs, with the consent of the widow made a division of the slaves among the heirs and widow, she reserving the right to take back the slaves at any time she should choose to do so. This condition was not communicated to the heirs. *Held*, that the acts and declarations of the heirs were inadmissible in evidence against the widow to show that she had consented to an unconditional surrender of the slaves allotted and an abandonment of her life estate, unless it were shown that she had knowledge of, or assented to, or acquiesced in, such acts and declarations, in some form or other. *Id.*
3. A compliance within the time agreed upon with the condition upon which a conditional sale of a chattel is to be void or the property returned reverts the title; and an offer to comply, or a tender of the money, is equivalent to payment, at least so far as to enable the vendor to maintain his action at law for the property or its value. *Teass' Adm'r v. Boyd*, 131.
  4. False representations made by a vendor in the sale of a chattel, to amount to a fraud upon the purchaser, must be known to be false when made, and made with intent to deceive. *Peers v. Davis' Administrators*, 184.
  5. Where there is a parol agreement for the purchase of real estate, and the purchaser pays a portion of the purchase money, but there is not such part performance as will take the case out of the statute of frauds, and a loss occurs, as by the burning of buildings, before the execution of a valid contract of sale, such loss will fall upon the vendor, and the purchaser may recover back the purchase money advanced. *Blew v. McClelland*, 304.
  6. The authority of an agent to make an executory contract for the sale of land need not be in writing. *Riley v. Minor*, 439.
  7. Delivery is necessary to the complete execution of a promissory note; if the payee obtain possession thereof by fraud he can not maintain an action thereon. *Carter v. McClintock*, 464.

## W

## WASTE.

1. Waste is a lasting damage to the reversion caused by the destruction, by the tenant for life or years, of such things on the land as are not included in its temporary profits. *Proffitt v. Henderson*, 325.
2. The cutting of timber may be waste although necessary to the profitable enjoyment of the land; it may be waste although the land is valuable for timber only. *Id.*

## WARRANT.

1. If a rate-bill and warrant issued by a board of school trustees under the twelfth subdivision of the fourth section of the fifth article of the act providing for the organization of schools (R. C. 1855, p. 1437) be regular and valid upon its face, the constable will be protected in executing it; he is not obliged to examine into the validity of those acts



## WARRANT—(Continued.)

of the board of trustees upon the basis of which the warrant and rate-bill are issued. *Turner v. Franklin*, 285.

## WESTON COURT OF COMMON PLEAS.

See EXECUTION, 7.

## WILLS AND TESTAMENTS.

1. The words "die without issue" in a bequest of chattels, made in this state prior to 1845, when used alone as designating the contingency upon which a limitation over by way of executing a bequest is to take effect, mean an indefinite failure of issue, and the contingency consequently being too remote the limitation over by way of executory bequest is void. *Chism's Adm'r v. Williams*, 288.
2. In order that other additional expressions in the will may override this well settled meaning of the words "die without issue," and make them mean a definite instead of an indefinite failure of issue, they must point incontestably and unequivocally to the death of the first taker as the period contemplated by the testator when the limitation over should take effect. *Id.*
3. A testator dying in 1832 bequeathed to his daughter Charity a horse, saddle and bridle, feather bed, a cow and calf, and a female slave; the will contained this further provision: "But here be it fully understood, that if my daughter Charity should die without issue, then and in that case what I have willed and bequeathed to her, it is my will and pleasure that it be given by [my] executors to my daughter Mahala, to be enjoyed by her and her heirs forever." *Held*, that the limitation over by way of executory bequest was void as being upon a contingency too remote, an indefinite failure of issue. *Id.*
4. A bequest of personal property by a husband to his wife would be no bar, under the tenth section of the dower act of 1845, (R. C. 1845, p. 431,) to her right of dower in the real estate of the husband. *Pemberton v. Pemberton*, 408.
5. Whether such a bequest would, if accepted, be a bar to the widow's right of dower in the residue of the personal estate must depend upon the intent and meaning of the will of the husband. If it is manifest from a fair construction of the will that the testator intended the bequest to be in lieu of dower, the widow must make her election; she can not accept the bequest and also claim dower as allowed by law. *Id.*
6. If a husband bequeaths to his widow a slave belonging to his children by a former marriage, and makes those children his residuary legatees, they will be put to their election, either to relinquish the slave or to renounce the legacies; they can not take both under and against the will. *Id.*
7. In the year 1849 one Bryan Mullanphy made his last will in the following words: "I, Bryan Mullanphy, do make and declare the following to be my last will and testament: One equal undivided third of all my property, real, personal and mixed, I leave to the City of St. Louis, in the state of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to

WILLS AND TESTAMENTS—(*Continued.*)

*settle in the west.* I do appoint Felix Costé and Peter G. Camden executors of this, my last will and testament, and of any other will or executory devise that I may leave. All and any such document will be found to be olograph, all in my own handwriting. In testimony whereof witness my hand and seal. [Signed] Bryan Mullanphy (seal).” The testator died in 1851, leaving a large estate, valued at more than a million and a half of dollars, the greater part of which consisted of lands situate in St. Louis county, beyond the limits of the city. The will was duly admitted to probate. *Held*, that the devise was a good and valid devise; that the City of St. Louis was capacitated to take and hold all the property embraced within the terms of the will upon the trusts therein indicated, and to execute and administer said trusts, subject to the control of a court of equity. *Chambers v. City of St. Louis*, 543.

## WITNESS.

1. Interest in the event of a suit will not disqualify a witness; he must, to be rendered incompetent, be a person for whose benefit the suit is prosecuted or defended. *Riddles v. Aiken*, 453.
2. An attorney at law is a competent witness in a cause in which he is engaged as attorney; he may testify as to privileged communications made to him by his client, if they are otherwise relevant, when called upon by his client so to do. *Id.*
3. The fact, that the plaintiff in a suit has engaged to pay over to another the sum sued for when recovered, does not render such person an incompetent witness in behalf of the plaintiff as being the person for whose benefit the suit is prosecuted. *Gott v. Williams*, 461.

## WRIT OF PROHIBITION.

1. In cases arising under the ordinances of the city of Boonville in which the fines assessed do not exceed the sum of five dollars, the decision of the mayor is final; it can not be reviewed on appeal or *certiorari*; nor can a writ of prohibition be resorted to to restrain the collection of the fine *Wertheimer v. Boonville*, 254.